

Taxation Without Immunization: Exercising the Federal Taxing Power to Increase Childhood Vaccination Rates

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TAXATION WITHOUT IMMUNIZATION: EXERCISING THE
FEDERAL TAXING POWER TO INCREASE CHILDHOOD
VACCINATION RATES

*Nicholas R. Consalvo**

Abstract

This Note will discuss the need to exercise the taxing power of the federal government in an effort to restore immunization rates to their historically high levels. Recent spikes in unvaccinated children have resulted in global outbreaks of diseases that were near elimination. This Note’s solution to the growing anti-vaccination movement is the implementation of a federal tax plan targeted at parents who—without a valid medical exemption—refuse to vaccinate their children against specific classes of vaccine-preventable diseases. This federal tax plan could take the form of an income-based tax, or loss of child tax credits, enforced against parents based on the age and amount of time their child has remained unvaccinated.

Global efforts to increase vaccination rates and fight outbreaks have already resulted in similar fines and taxes as those advocated in this Note. Currently, the entire public is responsible for the burden of funding initiatives to treat and prevent outbreaks caused by parents who abuse nonmedical exemptions to evade existing vaccination mandates. That burden must shift and fall only upon the individuals who refuse to acknowledge that immunizing against vaccine-preventable diseases is a fundamental necessity for preserving public health.

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* J.D. candidate 2020, University of Florida Levin College of Law; B.S., University of Florida 2017. I dedicate this Note to Kylie Paul, for suggesting this topic of great national importance and for her unwavering support throughout the note-writing process. I would also like to thank Professor Lars Noah for his guidance and advice in editing this Note; and the amazing editors and staff of the *Florida Law Review* who made this Note possible.

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In 1736 I lost one of my sons, a fine boy of four years old, by the small-pox, taken in the common way. I long regretted bitterly, and still regret that I had not given it to him by inoculation. This I mention for the sake of the parents who omit that operation, on the supposition that they should never forgive themselves if a child died under it; my example showing that the regret may be the same either way, and that, therefore, the safer should be chosen.¹

– Benjamin Franklin

INTRODUCTION

Resistance to immunization has been persistent since the first vaccination efforts in the early nineteenth century.² Unlike in previous eras, the recent spike in unvaccinated children is not attributable to isolated anti-vaccination groups, but anti-vaccine activities in major metropolitan areas.³ Recently, for example, historically low vaccination rates have resulted in measles outbreaks⁴ across the country—a disease

1. BENJAMIN FRANKLIN, AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 244 (John Bigelow ed., Philadelphia, J. B. Lippincott & Co., London, Trübner & Co., 1868).

2. Linda E. LeFever, Comment, *Religious Exemptions from School Immunization: A Sincere Belief or a Legal Loophole*, 110 PENN ST. L. REV. 1047, 1056 (2006).

3. See Jacqueline K. Olive et al., *Correction: The State of the Antivaccine Movement in the United States: A Focused Examination of Nonmedical Exemptions in States and Counties*, PLOS MED. (July 6, 2018), <https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1002616> [<https://perma.cc/Q36B-3ANG>].

4. *Measles Cases and Outbreaks*, CDC, <https://www.cdc.gov/measles/cases-outbreaks.html> [<https://perma.cc/MZ4J-JRXE>].

declared “eliminated” by the Centers for Disease Control and Prevention (CDC) in 2000.⁵ Growing parental concerns about the safety and efficacy of vaccines have pushed families to opt their children out of “mandatory” vaccinations required for school entry.⁶ Nonmedical exemptions (NMEs) based on religious or philosophical beliefs are consistently used and abused by parents seeking to avoid these mandatory vaccination requirements.⁷

So why the sudden decrease in vaccination rates? The skepticism towards immunization is actually the result of a slowly evolving trend spanning the last two decades. A major factor in the public outcry against immunizations is a 1998 article published by the British medical journal *The Lancet*.⁸ The article alleged a causal link between the Measles Mumps and Rubella (MMR) vaccine and autism.⁹ The study, conducted by Dr. Andrew Wakefield, was based on the evaluation of twelve autistic children and caused widespread panic among parents who began refusing mandatory vaccinations for their children.¹⁰ In 2004, however, *The Lancet* released findings that Dr. Wakefield’s research was flawed and heavily influenced by funding from solicitors seeking to sue the vaccine manufacturers on behalf of parents.¹¹ The journal released a statement explaining that the researchers “had conducted invasive investigations on the children without obtaining the necessary ethical clearances . . . [they] picked and chose data that suited their case; they falsified facts.”¹² The autism scare caused Britain’s immunization rates to plummet from 92%

5. *Measles History*, CDC, <https://www.cdc.gov/measles/about/history.html> [<https://perma.cc/AMC2-CVJH>].

6. See LeFever, *supra* note 2, at 1054.

7. See Jennifer L. Richards et al., *Nonmedical Exemptions to Immunization Requirements in California: A 16-Year Longitudinal Analysis of Trends and Associated Community Factors*, 31 *VACCINE* 3009, 3012 (2013).

8. See generally A. J. Wakefield et al., *Ileal-Lymphoid-Nodular Hyperplasia, Non-Specific Colitis, and Pervasive Developmental Disorder in Children*, 351 *LANCET* 637 (1998).

9. See *id.* at 640.

10. See Glenn Frankel, *Charismatic Doctor at Vortex of Vaccine Dispute*, WASH. POST (July 11, 2004), https://www.washingtonpost.com/archive/politics/2004/07/11/charismatic-doctor-at-vortex-of-vaccine-dispute/09772e4c-c904-474c-92a1-9740e12dadb7/?utm_term=.7db77403bf8c [<https://perma.cc/5GAQ-4LZR>].

11. See Richard Horton, *A Statement by The Editors of The Lancet*, *LANCET* (Feb. 23, 2004), <http://image.thelancet.com/extras/statement20Feb2004web.pdf> [<https://perma.cc/DE94-7WLS>].

12. *The Science Facts About Autism and Vaccines*, HEALTHCARE MGMT. DEGREE GUIDE (emphasis omitted), <https://www.healthcare-management-degree.net/autism-vaccines/> [<https://perma.cc/4DTL-F7WQ>]. After reports alleging the 1998 article’s fabrication surfaced, the *Lancet* formally retracted the article in 2010. See Editorial, *Retraction—Ileal-Lymphoid-Nodular Hyperplasia, Non-Specific Colitis, and Pervasive Developmental Disorder in Children*, 375 *LANCET* 445, 445 (2010), <https://www.sciencedirect.com/science/article/pii/S0140673610601754?via%3Dihub> [<https://perma.cc/3FXC-6RPU>].

in 1995 to 81% at the start of 2005.¹³ During that time, the number of reported measles cases more than tripled.¹⁴ While the article was eventually discredited as “utterly false,” the damage was already done as the falsehood spread globally.¹⁵

The most significant consequence of declining immunization rates and the failure to vaccinate is the risk posed to herd immunity. When a large enough percentage of the population is immunized against a disease, herd immunity serves as a protective barrier against the spread of infection to individuals who are not immunized or whose immune systems are otherwise compromised.¹⁶ As vaccination rates decrease, both those immunized and those who remain unvaccinated are at an increased risk of infection.¹⁷ “[T]he safety of the entire [herd] community is jeopardized when overall immunization rates fall below” what experts call a “critical threshold.”¹⁸ Herd immunity does not require a one hundred percent immunization rate, so “it is not necessary for every single [member of] a community to be vaccinated. However, herd immunity can exist only if a sufficiently high proportion of the population is immunized such that the transmission of the disease is effectively interrupted.”¹⁹ Therefore, a community cannot allow even a sizeable minority of its members to “free ride” on the protection afforded by its vaccinated members; otherwise no member can enjoy the benefits of herd immunity.²⁰

This Note will discuss the need for the federal government to exercise its constitutional taxing power in an effort to save herd immunity and restore immunization rates to their historically high levels. Part I details the case law establishing the power of the states to mandate vaccinations. This line of cases establishes the policy foundation behind the need for compulsory childhood immunizations. Furthermore, the United States Supreme Court’s decisions in these cases articulate the origins of the modern medical, religious, and personal-belief exemptions that will be at

13. See Roy Richard Grinker, *Offit Paul: Autism’s False Prophets: Bad Science, Risky Medicine and the Search for a Cure*, 39 J. AUTISM DEV. DISORD. 544, 544 (2008).

14. *Id.*

15. See Sarah Boseley, *Lancet Retracts ‘Utterly False’ MMR Paper*, GUARDIAN (Feb. 2, 2010, 11:29), <http://www.theguardian.com/society/2010/feb/02/lancet-retracts-mmr-paper> [<https://perma.cc/RLY8-GU97>].

16. Walter A. Orenstein et al., *Public Health Considerations-United States*, in VACCINES 1006 (Stanley A. Plotkin & Walter A. Orenstein eds., 3d ed. 1999).

17. *Id.*

18. Steve P. Calandrillo, *Vanishing Vaccinations: Why Are So Many Americans Opting Out of Vaccinating Their Children*, 37 U. MICH. J.L. REFORM 353, 419 (2004).

19. *Id.* at 420.

20. *Id.*

issue in this Note's suggested federal tax solution.²¹ Part II will then discuss these exemptions in greater length, along with an expanded view of their effect on herd immunity.

This Note's solution to the growing anti-vaccination movement, discussed in Parts III and IV, is the implementation of a federal tax plan targeted at parents who—without a valid medical exemption—refuse to vaccinate their children against specific classes of vaccine-preventable diseases. This proposed federal tax plan can work in one of two forms. The first form is an affirmative income tax issued to parents based on the age and the amount of time their child has remained unvaccinated. This tax would be based on household income and paid directly to the Internal Revenue Service (IRS) via yearly tax returns. Alternatively, the proposed federal tax plan could fit within existing tax regulations: parents who fail to vaccinate their child without a legitimate exemption would lose their current child tax credits when filing their yearly taxes.

While these penalties may seem drastic, this plan is consistent with tax penalties imposed in other developed countries around the world. For example, Australia recently implemented a “No Jab, No Pay” policy where parents lose \$28 AUD (just under \$20 USD) biweekly from their tax benefits for each child not up to date with their immunizations.²² Similarly, parents in Italy who refuse to vaccinate their children, in addition to being prohibited from enrolling them in public or private schools, face fines between €500 and €7,500 (\$553 to \$8,305 USD).²³

21. Over the past decade, rates of NMEs from school immunization requirements have increased dramatically. See Richards et al., *supra* note 7, at 3010. While not its primary function, this Note will also advocate for a stricter application of current NMEs. To maintain herd immunity and prevent the abuse of NMEs, only established medical exemptions should justify non-vaccination and excuse penalties otherwise imposed under this Note's suggested tax plan.

22. See Lucy Pasha-Robinson, *Australia to Issue Monthly Fines to Parents Who Don't Vaccinate Children*, INDEPENDENT (July 3, 2018, 3:16 PM), <https://www.independent.co.uk/news/world/australasia/parents-fined-children-vaccinations-measles-mmr-australia-baby-jabs-a8428596.html> [<https://perma.cc/3BJL-NHBC>] (“Previously, parents whose children were not up to date with vaccinations would lose an end of year payment to their family tax benefit, worth A\$737. The new fortnightly sanction will see parents lose out on roughly the same amount but is said to serve as a more ‘constant reminder’[.] . . . The move is part of an ongoing clampdown by the Australian government on the ‘anti-vaxxer’ movement after the percentage of children under seven with a ‘conscientious objection’ to immunization rose from 0.23 per cent in December 1999 to 1.77 per cent in December 2014, according to Australia’s parliament. Minister for Social Services Dan Tehan said the clampdown was necessary to protect public health.”). For currency conversion rates used to update the monetary figures throughout this paragraph see Foreign Exchange Rates – H.10 Weekly, Fed. Reserve (last visited Nov. 1, 2019), <https://www.federalreserve.gov/releases/h10/current/> [<https://perma.cc/TE9Q-KH8J>].

23. Einav Keet, *Europe Responds to Recent Measles Outbreaks with Tougher Vaccination Laws*, CONTAGIONLIVE (Mar. 12, 2018), <https://www.contagionlive.com/news/europe-responds-to-recent-measles-outbreaks-with-tougher-vaccination-laws> [<https://perma.cc/N8RW-ABVC>].

And parents in Germany and Romania who fail to follow health ministry requirements on vaccination face penalties up to €2,500 (\$2,768 USD) and €2,200 (\$2,420 USD), respectively.²⁴ Implementation of similar penalties in the United States is justified by the public policy arguments advanced in cases establishing the police power of the states,²⁵ as well as the Court's landmark decision in *National Federation of Independent Business v. Sebelius (NFIB)*.²⁶ There, the Court used a broad interpretation of the Taxing and Spending Clause to uphold the minimum coverage provision of the Patient Protection and Affordable Care Act (ACA).²⁷

I. HISTORY OF THE STATE'S POWER TO MANDATE VACCINATION

The development of mandatory childhood vaccination laws in the United States dates back over two hundred years.²⁸ Massachusetts was among the first states to enact legislation requiring the general population to receive smallpox vaccinations in 1809.²⁹ In 1855, Massachusetts also became the first state to mandate childhood vaccinations as a prerequisite to school entry.³⁰ Despite most states enacting similar school immunization laws during the late nineteenth century, widespread enforcement did not occur until after 1977 when the Childhood Immunization Initiative was launched in response to several measles outbreaks and declining immunization rates.³¹

24. See Marian Chiriac, *Romania Parents Face Fines for Refusing Child Vaccinations*, BALKANINSIGHT (Aug. 3, 2017), <https://balkaninsight.com/2017/08/03/romania-pushes-parents-to-vaccinate-children-08-02-2017/> [<https://perma.cc/G7M5-K37T>]; Keet, *supra* note 23. German officials who proposed the legislation to establish the penalty similarly defended their proposal on public policy grounds—drawing parallels to the government's ability to impose traffic fines on those whose reckless actions pose a danger to other drivers. See Melissa Eddy, *Germany Considers Fines for Not Vaccinating Children Against Measles*, N.Y. TIMES (May 7, 2019), <https://www.nytimes.com/2019/05/07/world/europe/germany-measles-fine.html> [<https://perma.cc/GGG7-5LXF>]. Germany's health minister, Jens Spahn, elaborated: "The goal [of the bill] is not to fine people, the goal is to ensure that people are immunized." *Id.*

25. See *infra* Part I.

26. 567 U.S. 519 (2012).

27. See *id.* at 562 (opinion of Roberts, C.J.); *infra* Part III.

28. See LeFever, *supra* note 2, at 1051.

29. *Id.*

30. See Alan R. Hinman et al., *Childhood Immunization: Laws That Work*, 30 J.L. MED. & ETHICS 122, 122 (2002).

31. *Id.* at 123 ("Since many vaccine-preventable diseases were primarily being transmitted in schools, a major effort was made to review the immunization status of school children and to immunize those in need. Over [the Initiative's] two-year period, more than 28 million records were reviewed and millions of doses of vaccine administered. As a result, measles incidence declined and immunization levels in school children rose dramatically. Major emphasis was placed on enactment and enforcement of school immunization requirements, with the result that 30 states formally changed their laws or regulations in the direction of increasing

A. *Protecting the Public Health*

In the early twentieth century, the Supreme Court ruled on the first major challenge to a law mandating vaccinations. In *Jacobson v. Massachusetts*,³² the Court established the authority under the states' police power to restrict individual liberties in the interest of protecting public health.³³ The Court denied a challenge to the City of Cambridge's mandatory smallpox vaccination policy, holding that reasonable public health regulations are justified when the community's health is at risk.³⁴ The policy required Cambridge residents to be immunized or face a fine of \$5 (equivalent to over \$128 in 2019 when adjusted for inflation).³⁵ In the majority opinion, Justice Harlan reasoned that "[t]here are manifold restraints to which every person is necessarily subject for the common good" and liberty secured by the Constitution does not guarantee freedom from restraint "at all times and in all circumstances."³⁶ The Court further dispelled the assertion that to be a valid use of the police power, immunization regulations must be based on universally held beliefs.³⁷ In doing so, the Court asserted that:

[t]he fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases.³⁸

Due to the overwhelming public support in favor of vaccinations both domestically and internationally, the Court held that citizens cannot

comprehensiveness and more rigorous enforcement. By the 1980–81 school year, all 50 states had laws covering first entrants to school.”)

32. 197 U.S. 11 (1905).

33. *See id.* at 38–39.

34. *Id.* at 12–13, 37–38.

35. *Id.* at 12; *see CPI Inflation Calculator*, U.S. BUREAU LAB. STAT., <https://data.bls.gov/cgi-bin/epicalc.pl?cost1=5.00&year1=191301&year2=201901> [<https://perma.cc/J23W-44DH>] (to adjust for inflation using the CPI Calculator, first place “\$5.00” in the query box; then put “January” and “1913” [this was the earliest date the calculator allowed for] into the first two boxes below; then put “January” and “2019” in the lowest two boxes; then click “Calculate”).

36. *Jacobson*, 197 U.S. at 26.

37. *Id.* at 35.

38. *Id.* (quoting *Viemeister v. White*, 72 N.E. 97, 99 (N.Y. 1904)).

ignore the legislature simply because they disagree as to the particular method chosen to protect the public health.³⁹

The principles established in *Jacobson* and subsequent case law have survived decades of evolving constitutional law.⁴⁰ For example, over “the last several decades, the Supreme Court has recognized a constitutionally protected ‘liberty interest’ in [adults] refusing unwanted medical treatment.”⁴¹ Yet the Court has been hesitant to establish broad liberty interests in bodily integrity as “fundamental.”⁴² The Court has, however, often ruled in favor of protecting the public health when balancing the rights of an individual against the interest of the state.⁴³

B. *Compulsory Vaccinations for School Admission*

Since *Jacobson*, the Supreme Court has clarified its ruling and expanded the scope of states’ power relating to mandates for children. Specifically, in *Zucht v. King*,⁴⁴ the Court upheld vaccination requirements as prerequisites for school admissions.⁴⁵ After public officials excluded Rosalyn Zucht from enrolling in both public and private schools for failing to provide a certificate of vaccination, Zucht brought suit claiming that the compulsory nature of the vaccination requirement violated her Equal Protection rights.⁴⁶ The Court denied the claim, citing its prior *Jacobson* ruling and the police power of the states that explicitly allows for compulsory vaccinations.⁴⁷ Additionally, the Court upheld the constitutionality of the vaccination requirement, stating that “reasonable classification[s] may be freely applied,” and do not violate the Equal Protection Clause merely because they are not “all-embracing.”⁴⁸

39. *Id.* See also Dorit Rubinstein Reiss & Lois A. Weithorn, *Responding to the Childhood Vaccination Crisis: Legal Frameworks and Tools in the Context of Parental Vaccine Refusal*, 63 BUFF. L. REV. 881, 909 (2015) (footnotes omitted) (noting that although states typically defer to parents on decisions regarding their children, “parental discretion is not unlimited . . . where parents’ decisions are deemed to endanger children’s welfare”).

40. Lawrence O. Gostin, *Jacobson v. Massachusetts at 100 Years: Police Power and Civil Liberties in Tension*, 95 AM. J. PUB. HEALTH 576, 578–79 (2005).

41. *Id.* at 580.

42. *Id.*

43. *Id.*

44. 260 U.S. 174 (1922).

45. See *id.* at 175–77.

46. *Id.* at 175–76.

47. *Id.* at 176.

48. *Id.* at 176–77.

1. Medical Exemptions

While the *Jacobson* Court upheld the policy and fine behind the compulsory vaccination law at issue in that case, it also recognized that certain exceptions existed.⁴⁹ Specifically, the Court recognized medical exemptions in situations where a vaccine treatment may unduly harm patients with predisposed medical conditions.⁵⁰ The Court has not addressed a vaccination law that completely eliminates all medical exemptions; however, this is because no such restriction exists. Of the three states that currently bar NMEs, all three permit medical exemptions.⁵¹ To prevent parents from misusing medical exemptions (in the absence of NMEs) to escape immunization laws, two of these states—Mississippi and West Virginia—require respective state health officials to review all medical exemptions.⁵² The lack of similar restrictions on medical exemptions within the United States reflects their universal acceptance. Consistent with this public perception and receptive to the medical necessity of certain exemptions, this Note does not advocate for the removal or restriction of medical exemptions in its proposed tax plan. Rather, this Note continues by addressing only the constitutionality of eliminating or altering the current state of NMEs, analyzing next the constitutional concerns surrounding Free Exercise and religious exemptions.

2. Free Exercise and Religious Exemptions

While the *Jacobson* Court purposely carved out room for medical exemptions, the Supreme Court has addressed the issue of religious exemptions with more scrutiny. In *Prince v. Massachusetts*,⁵³ while addressing a religious objection to child labor laws, the Court related the issue to religious vaccination objections, stating that a parent “cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds.”⁵⁴ In rejecting the Free Exercise claim, the Court again affirmed the states’ right to regulate issues of public health, reasoning that “[t]he 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.”⁵⁵ This decision established a foundation

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

50. *Id.*

51. See Michael Devitt, *Study Examines Fallout of California Vaccine Exemption Law*, AM. ACAD. FAM. PHYSICIANS (Nov. 27, 2018, 8:47 AM), <https://www.aafp.org/news/health-of-the-public/20181127califvacstudy.html> [<https://perma.cc/X3CL-2CKT>].

52. *Id.*

53. 321 U.S. 158 (1944).

54. *Id.* at 159–64, 166.

55. *Id.* at 166–67.

for the public's right to be free from—and parents' duty to protect their children from—a preventable, potentially fatal disease.⁵⁶

Following *Prince*, the Court articulated a “compelling state interest” standard for evaluating Free Exercise claims.⁵⁷ Despite the seemingly stringent language of the compelling-interest test, the Court generally sided with the government when individuals claimed that laws restricted their free exercise of religion.⁵⁸ However, in 1990, the Supreme Court retreated from the strict scrutiny standard in *Employment Division v. Smith*,⁵⁹ when it held that a law is valid under the Free Exercise Clause so long as it is religiously neutral and generally applicable.⁶⁰ The Court also stated, “We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”⁶¹ Although the Supreme Court has not yet addressed a Free Exercise challenge to a compulsory vaccination law with zero religious exemptions available, the opinion in *Smith* suggests that there is not a strong historical basis for requiring religious exemptions.⁶² In contrast, mandatory school immunization laws are neutral laws of general applicability that do not appear to violate the Free Exercise Clause under *Smith*.

In response to the Supreme Court's decision in *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA),⁶³ which provided additional statutory protection against government actions interfering with the free exercise of religion.⁶⁴ This attempt to restore pre-*Smith* strict scrutiny levels of protection established religious exemptions to any federal regulation (generally applicable or otherwise) by imposing a “substantial[] burden” test on religious beliefs.⁶⁵ Under this test, the government must prove that a given restriction was the least restrictive method of furthering a compelling government interest.⁶⁶ As states move

56. See Dorit Rubinstein Reiss, *Herd Immunity and Immunization Policy: The Importance of Accuracy*, 94 OR. L. REV. 1, 3 (2015). Authors who discuss the parental duty to protect children from the potential harms of vaccines tend to undermine the “parents’ [similar] duty to protect their child against [the] preventable, [yet] potentially fatal diseases” themselves. *Id.* at 3–4.

57. See *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

58. See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* 1297–99 (4th ed. 2011) (discussing how the Supreme Court has rarely invalidated laws when applying a strict scrutiny compelling state interest analysis to alleged violations of religious freedoms).

59. 494 U.S. 872 (1990).

60. *Id.* at 879, 884–85.

61. *Id.* at 878–79.

62. See CHERMERINSKY, *supra* note 58.

63. Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb–2000bb-4 (2012)), *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507 (1997).

64. See 42 U.S.C. § 2000bb-1(b).

65. *Id.*

66. *Id.*

towards stricter vaccination laws that eliminate religious exemptions, challenges to these laws will likely increase in the coming years.⁶⁷ Therefore, any federal vaccination legislation should include an exemption from the RFRA to avoid this sub-constitutional limitation on restricting religious freedoms.

II. THE ANTI-VACCINATION MOVEMENT'S EFFECT ON HERD IMMUNITY

The spread of disease is mitigated when a sizeable percentage of the population receives proper vaccination.⁶⁸ Such widespread vaccination indirectly protects unimmunized individuals, including children who are too young to receive vaccinations and those who cannot be vaccinated due to preexisting medical conditions.⁶⁹ This is the principle of herd immunity.⁷⁰ Overall, the anti-vaccination movement has had detrimental effects on the safeguards provided by herd immunity.

A. Herd Immunity Thresholds

When the majority of the population is vaccinated, it is more difficult for a disease to maintain a chain of infection.⁷¹ Therefore, when more people adhere to the proper vaccination schedules, the protective effect of herd immunity increases.⁷² In contrast, when only a small percentage of the population is vaccinated, the risk of a disease outbreak significantly increases.⁷³ The unvaccinated members of the population are no longer indirectly protected, and each community member faces a higher risk of infection⁷⁴—including members of the community who properly received their vaccination. This is because as the disease spreads, mutations occur that create new strains that are potentially resistant to the existing vaccine.⁷⁵ “For some diseases, herd immunity may . . . be induced with as little as 40% of the population vaccinated. More commonly, and depending on the contagiousness of the disease,

67. See, e.g., *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1159 (10th Cir. 2015) (applying RFRA against the ACA’s contraceptive mandate), *vacated sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

68. AM. PHARMACISTS ASS’N, APHA PHARMACY-BASED IMMUNIZATION DELIVERY: MODULE 2. OVERVIEW OF IMMUNOLOGY AND VACCINE DEVELOPMENT 8 (2017).

69. *Id.*

70. *Id.*

71. *Vaccines Protect Your Community*, VACCINES.GOV, <https://www.vaccines.gov/basics/work/protection/index.html> [<https://perma.cc/DTJ2-T3LY>].

72. *Id.*

73. *Id.*

74. *Id.*

75. See, e.g., Stephanie J. Schrag et al., *Spontaneous Mutation Rate of Measles Virus: Direct Estimation Based on Mutations Conferring Monoclonal Antibody Resistance*, 73 J. VIROLOGY 51, 51 (1999).

[immunization] rates may need to be as high as 80%-95%.”⁷⁶ “For example, measles is so contagious that even with the highly effective [MMR vaccine], 83% to 94% of the population needs to be vaccinated to stop the spread of the disease.”⁷⁷ These percentages represent what is known as the “herd immunity threshold.”⁷⁸ Once vaccination rates for a particular disease reach this critical threshold, it is still necessary to continuously mandate immunizations to prevent future outbreaks.

B. *Global Effects of Decreased Coverage*

The World Health Organization (WHO) recently identified the anti-vaccination movement as a top ten global public health threat of 2019.⁷⁹ In discussing the danger of “[v]accine hesitancy,” the WHO stated that “complacency, inconvenience in accessing vaccines, and lack of confidence are key reasons underlying” the decreasing immunization rates.⁸⁰ The WHO also pointed to the global 30% increase in measles cases as evidence of the anti-vaccination movement’s profound effect.⁸¹ The MMR vaccine is particularly relevant in the discussion of the anti-vaccination movement because—despite its effectiveness—its high herd immunity threshold lends itself to outbreaks when vaccination rates begin to fall.⁸² Researchers and public health officials are easily alerted of global anti-vaccination movements when countries that were close to eliminating diseases like measles now see a resurgence.⁸³

The most profound effects of decreasing MMR vaccinations have been seen across Western Europe and North America.⁸⁴ By 2000, the national vaccination rate of Ireland had fallen below 80%, with areas of Northern Dublin averaging just 60% coverage.⁸⁵ Similarly, in 2003, the MMR immunization rate in the United Kingdom fell far below the herd immunity threshold needed to avoid outbreaks—reaching as low as 61% in parts of London.⁸⁶ Domestically, the United States’ childhood MMR

76. Coll. of Physicians of Phila., *Successful Herd Immunity*, HIST. VACCINES, <http://www.historyofvaccines.org/content/herd-immunity-0> [<https://perma.cc/8TFU-4MD6>].

77. AM. PHARMACISTS ASS’N, *supra* note 68, at 8.

78. Coll. of Physicians of Phila., *supra* note 76.

79. *Ten Threats to Global Health in 2019*, WHO, <https://www.who.int/emergencies/ten-threats-to-global-health-in-2019> [<https://perma.cc/A4KC-ABVE>].

80. *Id.*

81. *Id.*

82. AM. PHARMACISTS ASS’N, *supra* note 68, at 8.

83. *Ten Threats to Global Health in 2019*, *supra* note 79.

84. Azhar Hussain et al., *The Anti-Vaccination Movement: A Regression in Modern Medicine*, CUREUS (July 3, 2018), <https://www.cureus.com/articles/13250-the-anti-vaccination-movement-a-regression-in-modern-medicine> [<https://perma.cc/3WW3-6XQZ>].

85. *Id.*

86. *Id.*

vaccination rate decreased 2% between 1999 and 2000.⁸⁷ “[W]orldwide, there are estimated to be 20 million cases of measles and 164,000 measles-related deaths each year”⁸⁸

Several recent measles outbreaks in the United States have been traced to international travelers and declining domestic vaccination rates.⁸⁹ When international travelers return to the United States with diseases they contracted overseas, they infect unvaccinated or under-vaccinated populations, resulting in outbreaks.⁹⁰ The most recent and infamous example of a domestic measles outbreak occurred in late 2014, when an outbreak originating from the Disneyland Resort in Anaheim, California, resulted in over 125 people contracting the disease.⁹¹ “It was estimated that MMR vaccination rates among the exposed population . . . [may have been] as low as 50% and likely no higher than 86%. Physicians in the region were criticized for deviating from the CDC’s . . . recommended vaccination schedule” and in some cases even discouraging their patients to receive vaccinations.⁹² Following the outbreak, California passed a vaccination law in June 2015, banning personal and religious exemptions that allowed people to abstain from mandatory vaccinations.⁹³

Overall, the anti-vaccination movement threatens decades-old herd immunity safeguards and risks significant financial burdens to taxpayers who fund public disease prevention agencies like the CDC. A recent study conducted by the American Medical Association estimated that “[a] 5% decline in MMR vaccine coverage in the United States would result in an estimated 3-fold increase in measles cases for children aged 2 to 11 years . . . [and] an additional \$2.1 million in public sector costs.”⁹⁴ The study also cautioned that these “numbers would be substantially higher if unvaccinated infants, adolescents, and adult populations were also considered.”⁹⁵

87. *Id.*

88. AM. PHARMACISTS ASS’N, APHA PHARMACY-BASED IMMUNIZATION DELIVERY: MODULE 1. PHARMACISTS, VACCINES, AND PUBLIC HEALTH 4 (2017).

89. *Id.*

90. *Id.*

91. Hussain et al., *supra* note 84; Jennifer Zipprich, et al., *Measles Outbreak — California, December 2014–February 2015*, CDC: MORBIDITY & MORTALITY WKLY. REP. (Feb. 20, 2015), https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6406a5.htm?s_cid=mm6406a5_w [<https://perma.cc/T3F4-8G44>].

92. Hussain et al., *supra* note 84 (footnote omitted).

93. *See generally* S.B. 277, Reg. Sess. (Cal. 2015); Michael Martinez & Amanda Watts, *California Governor Signs Vaccine Bill That Bans Personal, Religious Exemptions*, CNN (June 30, 2015, 10:51 PM), <https://www.cnn.com/2015/06/30/health/california-vaccine-bill/index.html> [<https://perma.cc/2LTV-R5RU>].

94. Nathan C. Lo & Peter J. Hotez, *Public Health and Economic Consequences of Vaccine Hesitancy for Measles in the United States*, 171 JAMA PEDIATRICS 887, 887 (2017).

95. *Id.*

Although studies analyzing the coverage and effectiveness of the MMR vaccine are readily citable due to the timely nature of recent measles outbreaks, it is important to acknowledge how the baseless hysteria surrounding the efficacy of the MMR vaccine morphed to negatively affect vaccination practices broadly. For example, subsequent concerns about an alleged link between thimerosal—a mercury-based organic compound used as a preservative in vaccines⁹⁶—and autism, continued fueling the movement against immunizations. Despite multiple credible studies finding no relationship for such a link,⁹⁷ declining immunization rates among other vaccines such as the DTaP vaccine⁹⁸ have caused a dangerous increase in pertussis cases across the globe.⁹⁹

III. CONSTITUTIONAL LIMITS OF THE FEDERAL TAXING POWER

The most effective way to increase vaccination rates, protect herd immunity, and raise revenue for national vaccination and disease prevention programs is for the federal government to use its taxing power to tax parents who unjustifiably refuse immunizations for their children. This can be achieved in one of two ways: First, the government could implement an affirmative vaccine-refusal tax structured around annual household income. Parents who fail to provide proof of mandatory vaccinations for their child would face an additional tax burden when filing their yearly tax returns with the IRS. Under an alternative approach, the government can prohibit parents who opt out of the mandatory vaccinations from receiving child tax credits when filing with the IRS.¹⁰⁰ While using the federal taxing power could increase vaccination rates and strengthen herd immunity, it will likely face numerous constitutional challenges.

96. *Thimerosal and Vaccines*, U.S. FOOD & DRUG ADMIN. (Feb. 1, 2018) <https://www.fda.gov/vaccines-blood-biologics/safety-availability-biologics/thimerosal-and-vaccines> [<https://perma.cc/3BFP-3KSF>].

97. *See, e.g., id.* (explaining that the amount of mercury present when thimerosal is used as a preservative in vaccines was shown to be “roughly the same amount of elemental mercury contained in a 3 ounce can of tuna fish”); Jon Heron et al., *Thimerosal Exposure in Infants and Developmental Disorders: A Prospective Cohort Study in the United Kingdom Does Not Support a Causal Association*, 114 *PEDIATRICS* 577 (2004); William W. Thompson et al., *Early Thimerosal Exposure and Neuropsychological Outcomes at 7 to 10 Years*, 357 *NEW ENG. J. MED.* 1281 (2007); *see also* Reiss & Weithorn, *supra* note 39, at 891 (“There is also no scientific support for another allegation—that the recommended vaccine schedule clusters too many vaccines too early in a child’s life.”).

98. *See infra* note 180.

99. Jason M. Glanz, et al., *Parental Refusal of Pertussis Vaccination Is Associated With an Increased Risk of Pertussis Infection in Children*, 123 *PEDIATRICS* 1446, 1449–50 (2009).

100. *See generally* *What’s New with the Child Tax Credit After Tax Reform*, IRS (Nov. 27, 2018), <https://www.irs.gov/newsroom/whats-new-with-the-child-tax-credit-after-tax-reform> [<https://perma.cc/HA4S-JBG2>].

A. *History of the Taxing Power*

Article I, Section 8, of the United States Constitution authorizes Congress “[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States.”¹⁰¹ The Taxing and Spending Clause was designed to finance the newly formed national government “by taxing individuals and private entities directly.”¹⁰² While Congress’s power to tax is extremely broad, no constitutional power is absolute. The Constitution specifically places constraints on direct taxes.¹⁰³ Article I, Section 9, Clause 4 of the Constitution requires that direct taxes be apportioned among the states by population¹⁰⁴—with the exception of income taxes, which are exempt under the Sixteenth Amendment.¹⁰⁵

Additionally, Congress cannot lay and collect a “tax” simply because it chose to categorize a monetary “penalty” under the Taxing and Spending Clause.¹⁰⁶ In other words, a tax “penalty” cannot be imposed for violations of federal laws enacted under a different constitutional power such as the Commerce Clause.¹⁰⁷ For example, in the landmark case *Bailey v. Drexel Furniture Co.*,¹⁰⁸ the Supreme Court invalidated a purported “tax” on employers who used child labor because it acted as a “penalty” to punish violations of a regulatory provision prohibiting such labor.¹⁰⁹ The “exceedingly heavy burden” imposed by the tax, the scienter requirement that the employers “knowingly employed underage laborers,”¹¹⁰ and the fact that payments were made to the Department of Labor and not the IRS were all significant factors that influenced the Court’s ruling.¹¹¹

101. U.S. CONST. art. I, § 8, cl. 1.

102. Robert J. Pushaw, Jr., *The Paradox of the Obamacare Decision: How Can the Federal Government Have Limited Unlimited Power?*, 65 FLA. L. REV. 1993, 2019 (2013); see also THE FEDERALIST NO. 45 (James Madison) (explaining that the Taxing and Spending Clause’s purpose was to ensure the federal government maintained adequate revenues to pay off debts, fund the military, and promote the welfare of the United States by facilitating international commerce).

103. See, e.g., U.S. CONST. art. I, § 2, cl. 3.

104. See *id.* § 9, cl. 4.

105. See *id.* amend. XVI.

106. See Erik M. Jensen, *The Individual Mandate and the Taxing Power*, 134 TAX NOTES 97, 110 (2012).

107. *Id.* at 103–04.

108. 259 U.S. 20 (1922).

109. See *id.* at 34–35, 38.

110. Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 565–66 (2012) (discussing the justifications of the scienter requirement in *Drexel Furniture*). Similar scienter requirements are common in punitive statutes. *Id.* at 566. This conforms to the general public policy that society—through legislation passed by Congress—only “wishes to punish . . . those who intentionally break the law.” *Id.*

111. *Drexel Furniture*, 259 U.S. at 37.

The Constitution's Taxing and Spending Clause empowers the federal government to raise revenues; however, unlike the Commerce Clause, it does not facially grant Congress the authority to promote a regulatory goal beyond regulations necessary to assess and collect taxes.¹¹² Yet the Supreme Court has historically upheld tax measures with obvious regulatory effects when the exaction was primarily focused on raising revenue.¹¹³

B. *The NFIB Decision*

In 2010, Congress passed the Patient Protection and Affordable Care Act (ACA),¹¹⁴ commonly referred to as "Obamacare." The ACA has been the subject of intense political debate from the time President Obama articulated his plan for healthcare reform, and it triggered massive litigation upon its enactment. Minutes after President Barack Obama signed the ACA into law, thirteen states, including the State of Florida, filed suit in federal district court alleging that the law was unconstitutional on multiple grounds.¹¹⁵ After the original plaintiffs filed the complaint, thirteen additional states, several individual plaintiffs, and the National Federation of Independent Business joined in the suit.¹¹⁶ By June 2012, the Supreme Court made its decision regarding the ACA's constitutionality, specifically in regard to the "individual mandate" that "require[d] most Americans to maintain 'minimum essential' health insurance coverage"¹¹⁷ or else "make a '[s]hared responsibility payment' to the Federal Government."¹¹⁸

First, the Court considered whether the individual mandate could be sustained under Congress's power to regulate interstate commerce.¹¹⁹

112. *See id.* at 38.

113. *See, e.g.,* *Sonzinsky v. United States*, 300 U.S. 506, 511–13 (1937) (upholding a statutory "tax" on firearms even though the statute was particularly harsh as to certain types of guns and Congress's regulatory aim was clear); *McCray v. United States*, 195 U.S. 27, 63–64 (1904) (sustaining a statute that imposed a vastly higher tax on artificially colored margarine because the law produced revenue and Congress had a legitimate objective to discourage the adulteration of food products, despite the fact that this tax also had the purpose of preferring manufacturers of butter rather than margarine).

114. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 21, 25, 26, 29, and 42 U.S.C.).

115. *Florida ex rel. Bondi v. U.S. Dep't of Health & Hum. Servs.*, 780 F. Supp. 2d 1256, 1263 (N.D. Fla.), *order clarified*, 780 F. Supp. 2d 1307 (N.D. Fla.), *aff'd in part, rev'd in part sub nom. Florida ex rel. Attorney Gen. v. U.S. Dep't of Health & Hum. Servs.*, 648 F.3d 1235 (11th Cir. 2011), *aff'd in part, rev'd in part sub nom. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012); *see Sebelius*, 567 U.S. at 540.

116. *Sebelius*, 567 U.S. at 540.

117. *Id.* at 539 (quoting 26 U.S.C. § 5000A (Supp. IV 2010)).

118. *Id.* (alteration in original) (quoting 26 U.S.C. § 5000A(b)(1)).

119. *Id.* at 548–58 (opinion of Roberts, C.J.); *see also* U.S. CONST. art. I, § 8, cl. 3.

The mandate failed under the Court's analysis. Chief Justice Roberts, writing only for himself, reasoned that "[t]he power to *regulate* commerce presupposes the existence of commercial activity to be regulated."¹²⁰ "The individual mandate . . . does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce . . . on the ground that their failure to do so affects interstate commerce."¹²¹ Furthermore, Chief Justice Roberts rejected the Government's arguments that all people are "active in the market for health care"¹²² or "will, at some unknown point in the future, engage in a healthcare transaction."¹²³

Upon determining that the mandate could not survive under the Commerce Clause, the Court then analyzed whether it could be sustained as an Article I tax.¹²⁴ Congress, however, had repeatedly described the mandate as "penalty," not a "tax."¹²⁵ To overcome this hurdle, the Chief Justice invoked a canon of statutory interpretation that "if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so."¹²⁶

1. Penalty or Tax?

When distinguishing penalties from taxes, the Supreme Court has explained, "[I]f the concept of penalty means anything, it means punishment for an unlawful act or omission."¹²⁷ Revenue generation should be the main purpose behind a tax. That is not to say, however, that a tax cannot be enacted with the intent to affect individual conduct.¹²⁸ "[T]axes that seek to influence conduct are nothing new."¹²⁹ For instance, taxes on the sale of tobacco now "compose more than half the retail price of cigarettes."¹³⁰ These taxes are not designed solely to raise government

120. *Sebelius*, 567 U.S. at 550 (opinion of Roberts, C.J.).

121. *Id.* at 552.

122. *Id.* at 556 (quoting Brief for Petitioners (Minimum Coverage Provision) at 7, 18, 34, 50, Dep't of Health & Hum. Servs. v. Florida, 132 S. Ct. 2566 (2012) (No. 11-398)).

123. *Id.* at 557.

124. *Id.* at 561.

125. *Sebelius*, 567 U.S. at 543–46 (majority opinion).

126. *Id.* at 562 (opinion of Roberts, C.J.).

127. *Id.* at 567 (majority opinion) (quoting *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996)).

128. *Id.*; see *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937) ("Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed.")

129. *Sebelius*, 567 U.S. at 567.

130. *Id.*

revenue, but rather “to encourage people to quit smoking.”¹³¹ The courts have similarly upheld other obvious regulatory measures such as taxes on marijuana¹³² and gun sales.¹³³

While the individual mandate in *NFIB* would have raised considerable revenue, the payment was clearly more focused on inducing the purchase of health insurance.¹³⁴ However, in his majority opinion, Chief Justice Roberts pointed to the mandate’s lack of “negative legal consequences.”¹³⁵ The failure to purchase health insurance was not itself unlawful.¹³⁶ There were no consequences for not buying health insurance, other than “requiring a payment to the IRS.”¹³⁷ Therefore, “if someone chooses to pay [the tax] rather than obtain health insurance, they [would] fully compl[y] with the law.”¹³⁸

2. The Individual Mandate Is Not a Direct Tax

Even if the Taxing and Spending Clause enables Congress to impose a tax on individuals who choose not to obtain health insurance, “any tax must still comply with other requirements in the Constitution.”¹³⁹ In *NFIB*, the plaintiffs argued that the shared responsibility payment violated Article I, Section 9, Clause 4 of the Constitution, which provides that “[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.”¹⁴⁰ This clause requires that any direct tax must be “apportioned so that each State pays in proportion to its population.”¹⁴¹ Although Congress had made no effort to apportion the individual mandate tax among the states, the Court pointed to the income tax exception permissible under the Sixteenth Amendment.¹⁴² The Court articulated its

131. *See id.*; *see also* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 687 (4th ed., Boston, Little, Brown, and Co. 1873) (“[T]he taxing power is often, very often, applied for other purposes, than revenue.”).

132. *See United States v. Sanchez*, 340 U.S. 42, 45 (1950).

133. *See Sonzinsky*, 300 U.S. at 511–12.

134. *Sebelius*, 567 U.S. at 567.

135. *Id.* at 568.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 570.

140. U.S. CONST. art. I, § 9, cl. 4; *see Sebelius*, 567 U.S. at 570.

141. *Sebelius*, 567 U.S. at 570.

142. *Id.* at 571; *see Springer v. United States*, 102 U.S. 586, 602 (1881) (holding “that *direct taxes*, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate”); *see also Pollock v. Farmers’ Loan & Trust Co.*, 158 U.S. 601, 618 (1895) (expanding the interpretation of *Springer* to include to include taxes on personal property and income from personal property and striking down aspects of the federal income tax), *superseded by constitutional amendment*, U.S. Const. amend. XVI; *cf. Eisner v.*

distinction between a direct tax and the shared responsibility payments as follows:

A tax on going without health insurance does not fall within any recognized category of direct tax. It is not a capitation. Capitations are taxes paid by every person, “without regard to property, profession, or *any other circumstance*.” The whole point of the shared responsibility payment is that it is triggered by specific circumstances—earning a certain amount of income but not obtaining health insurance. The payment is also plainly not a tax on the ownership of land or personal property.¹⁴³

In short, the Court concluded that “[t]he shared responsibility payment is thus not a direct tax that must be apportioned among the several States.”¹⁴⁴

3. Breadth of Congressional Taxing Power

Speaking for the majority of the court, Chief Justice Roberts addressed a fundamental objection as to the taxing power’s scope.¹⁴⁵ How can the federal government impose a burden on an omission—a lack of health insurance—not an act?¹⁴⁶ This concern was a primary component that the Court used to strike down the individual mandate under the Commerce Clause, and the dissenting Justices raised this concern as well—regarding objections under the taxing power.¹⁴⁷ But Chief Justice Roberts quelled these objections with a three-part analysis.¹⁴⁸ Most importantly, he explained that “it is abundantly clear the Constitution does not guarantee that individuals may avoid taxation through

Macomber, 252 U.S. 189, 218–19 (1920) (applying the Sixteenth Amendment to overturn the income tax apportionment requirement in *Pollock*, while upholding the requirement for taxes on personal property).

143. *Sebelius*, 567 U.S. at 571 (citation omitted).

144. *Id.*

145. *See id.* at 571–72.

146. *See id.* at 572–74.

147. *Id.* at 571–72 (“If it is troubling to interpret the Commerce Clause as authorizing Congress to regulate those who abstain from commerce, perhaps it should be similarly troubling to permit Congress to impose a tax for not doing something.”); *see id.* at 661–70 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting); *see also* Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 607–13 (2010) (setting forth the arguments that were later adopted by the joint dissent). Barnett was a key contributor to the litigation challenging the ACA. *See generally* Randy E. Barnett, *No Small Feat: Who Won the Health Care Case (and Why Did So Many Law Professors Miss the Boat)?*, 65 FLA. L. REV. 1331 (2013) (describing his litigation experience fighting the ACA from the perspective of both an academic scholar and a lawyer).

148. *See Sebelius*, 567 U.S. at 572–74.

inactivity.”¹⁴⁹ By its nature, a capitation “is a tax that everyone must pay simply for existing, and [such a tax is] expressly contemplated by the Constitution.”¹⁵⁰ The Court held that while the Constitution protects individuals who abstain from activity regulated under the Commerce Clause, no such protection exists with respect to taxes.¹⁵¹

But “Congress’s ability to use its taxing power to influence conduct is not without limits.”¹⁵² The Court has historically demonstrated the ability to aggressively limit the scope of the taxing power by invalidating penalties clearly designed to regulate behavior beyond the scope of federal authority.¹⁵³ Recently, the Court has declined the opportunity to closely examine regulatory motives or coercive effects of revenue-raising measures.¹⁵⁴ Similarly, in *NFIB*, the Court explained that the individual mandate’s shared responsibility payment “pass[ed] muster as a tax under our narrowest interpretations of the taxing power.”¹⁵⁵ Because the mandate fit within the Court’s strictest limits of the taxing power, Chief Justice Roberts declined to establish a precise point at which a penalty becomes so punitive that the taxing power cannot authorize it.¹⁵⁶

“[A]lthough the breadth of Congress’s power to tax is greater than its power to regulate commerce, the taxing power does not give Congress the same degree of control over individual behavior.”¹⁵⁷ A regulation validly enacted under the Commerce Clause allows the federal government to enforce regulations with its full and complete power.¹⁵⁸ Congress can command individuals to conform to the regulation with the threat of potential criminal sanctions.¹⁵⁹ These potential sanctions can take the form of fines and imprisonment, both of which have the added consequences that accompany the brand of a criminal.¹⁶⁰ “By contrast, Congress’s authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more.”¹⁶¹ If the tax

149. *Id.* at 572.

150. *Id.*

151. *Id.*; see also Letter from Benjamin Franklin to M. Le Roy (Nov. 13, 1789), in 12 THE WORKS OF BENJAMIN FRANKLIN 161 (John Bigelow ed., 1904) (“Our new Constitution is now established . . . but in this world nothing can be said to be certain, except death and taxes.”).

152. *Sebelius*, 567 U.S. at 572.

153. *Id.*; see, e.g., *United States v. Butler*, 297 U.S. 1, 53–57, 78 (1936) (holding unconstitutional a tax imposed on farmers by the Agricultural Adjustment Act).

154. *Sebelius*, 567 U.S. at 573; see also, e.g., *United States v. Kahriger*, 345 U.S. 22, 27–31 (1953), *overruled in part by* *Marchetti v. United States*, 390 U.S. 39 (1968).

155. *Sebelius*, 567 U.S. at 573.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 574.

is paid timely, “the Government has no power to compel or punish individuals” to conform to the underlying intent of the regulation.¹⁶² While tax burdens may still cause significant hardship, the imposition of a tax nonetheless leaves individuals with the choice to act (or not act), so long as they are willing to pay a tax levied on that action or omission.¹⁶³

IV. POST-*NFIB* FEDERAL VACCINE-REFUSAL TAX PLAN

Although allowing states to regulate mandatory immunization requirements was once effective,¹⁶⁴ such regulatory efforts have recently begun to fail and threaten public herd immunity protections against vaccine-preventable diseases.¹⁶⁵ This failure is in part because school mandates alone no longer do the trick. Simply checking a box on a school entrance form claiming exemption based on “personal belief” is an ineffective checkpoint that parents continue to abuse. Additionally, the growing popularity of homeschooling among this subpopulation calls for legislative reform to ensure mandatory vaccination requirements are being met, regardless of a child’s educational platform. The anti-vaccination movement’s roots in metropolitan areas consisting of middle- and upper-middle-class Americans¹⁶⁶ allow a vaccine-refusal tax, implemented through tax return filings, to effect the most change among this subset of the population.

A tax or loss of child tax credit for failure to follow a required immunization schedule will equally serve to generate revenue while inducing the regulatory purpose of increasing immunization rates for select vaccine-preventable diseases. As of the 2018 tax year, the child tax credit increased from \$1,000 to \$2,000.¹⁶⁷ The credit is now also refundable up to \$1,400, meaning “[i]f a taxpayer doesn’t owe any tax before claiming the credit, they will receive up to \$1,400 as part of their refund.”¹⁶⁸ Additionally, the “earned income threshold” of the credit requires that families must claim an income of at least \$2,500 to qualify for the credit.¹⁶⁹ These requirements—and the fairly moderate amount of the potential credit—ensure that people except those at the very bottom or the very top of the income distribution brackets would most notice the impending loss of the credit. Implementing a vaccination requirement as an additional qualification for the child tax credit would therefore have

162. *Id.*

163. *See id.*

164. *See supra* Part I.

165. *See supra* Part II.

166. *See Olive et al., supra* note 3, at 7.

167. *See IRS, supra* note 100.

168. *Id.*

169. *Id.*

the most influence on middle-income families, where the majority of the participants in the anti-vaccination movement reside.¹⁷⁰

Moreover, any revenue generated from this tax plan can serve to fund national vaccination programs, disease containment and outbreak prevention, and other public health initiatives. “[T]axes that seek to influence [regulatory] conduct are not[] new.”¹⁷¹ Historically, taxes are often enacted to both raise revenue and curb individual conduct.¹⁷² Courts have permitted such revenue to be earmarked for purposes other than general revenue: taxes on cigarettes provide funds to the Bureau of Alcohol, Tobacco, Firearms and Explosives,¹⁷³ and revenues raised from vaccinations finance an injury-compensation fund under the National Childhood Vaccine Injury Act.¹⁷⁴ If courts are willing to uphold taxes such as these, which show clear regulatory purpose,¹⁷⁵ then it seems only logical to similarly uphold a reasonable vaccination tax initiative that addresses what the Court itself has described as a valid interest in protecting the public health.

A. Implementation

The CDC releases yearly recommended immunization schedules for children from birth to six years old.¹⁷⁶ Included in this report is a list of vaccine-preventable diseases and their potentially deadly health outcomes.¹⁷⁷ Any federal vaccine-refusal tax should include the preventable diseases and accompanying vaccinations listed below in Table 1.¹⁷⁸

170. See Olive et al., *supra* note 3, at 7.

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

172. *Id.*; see Sonzinsky v. United States, 300 U.S. 506, 513 (1937) (“Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed.”).

173. See, e.g., United States v. King Mountain Tobacco Co., Inc., 899 F.3d 954, 962–63 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2691 (2019). See also *Fact Sheet: Tobacco Enforcement, BUREAU ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES* (May 2018), <https://www.atf.gov/resource-center/fact-sheet/fact-sheet-tobacco-enforcement> [<https://perma.cc/UCN6-MMRJ>].

174. Pub. L. No. 99-660, 100 Stat. 3755, 3756-58 (codified as amended at 42 U.S.C. §§ 300aa-1 to 300aa-33 (2012)).

175. See, e.g., Jacobson v. Massachusetts, 197 U.S. 11, 27–30, 39 (1905).

176. *2019 Recommended Immunizations for Children from Birth Through 6 Years Old*, CDC (2019) [hereinafter *Immunizations*], <https://www.cdc.gov/vaccines/parents/downloads/parent-ver-sch-0-6yrs.pdf> [<https://perma.cc/SCB3-W77L>].

177. *Id.*

178. Not all doctors are true believers in the recommended immunization schedule proposed by the CDC. See Olga Khazan, *The Shadow Network of Anti-Vax Doctors*, ATLANTIC (Jan. 18, 2017), <https://www.theatlantic.com/health/archive/2017/01/when-the-doctor-is-a-vaccine-skeptic/513383/> [<https://perma.cc/S8EH-SHXC>]. Such doctors may raise federalism objections to this tax plan, arguing that it intrudes on their professional freedom to practice medicine

Table 1: Preventable Diseases¹⁷⁹

Vaccine-Preventable Diseases and the Vaccines that Prevent Them			
Disease	Vaccine ¹⁸⁰	Disease spread by	Disease complications
Chickenpox	Varicella vaccine	Air, direct contact	Infected blisters, bleeding disorders, encephalitis (brain swelling), pneumonia (infection in the lungs)
Diphtheria	DTaP vaccine	Air, direct contact	Swelling of the heart muscle, heart failure, coma, paralysis, death
Hib [(Haemophilus influenzae type b)]	Hib vaccine	Air, direct contact	Meningitis (infection of the covering around the brain and spinal cord), intellectual disability, epiglottitis (life-threatening infection that can block the windpipe and lead to serious breathing problems), pneumonia (infection in the lungs), death
Hepatitis A	HepA vaccine	Direct contact, contaminated food or water	Liver failure, arthralgia (joint pain), kidney, pancreatic and blood disorders
Hepatitis B	HepB vaccine	Contact with blood or body fluids	Chronic liver infection, liver failure, liver cancer
Influenza (Flu)	Flu vaccine	Direct contact, contaminated food or water	Pneumonia (infection in the lungs)
Measles	MMR vaccine	Air, direct contact	Encephalitis (brain swelling), pneumonia (infection in the lungs), death
Mumps	MMR vaccine	Air, direct contact	Meningitis (infection of the covering around the brain and spinal cord), encephalitis (brain swelling), [i]nflammation of testicles or ovaries, deafness

according to their respective state’s restrictions. For a response to such concerns see Lars Noah, *Ambivalent Commitments to Federalism in Controlling the Practice of Medicine*, 53 U. KAN. L. REV. 149, 159–60 (2004).

179. Notably, Table 1 does not include the column for “Disease symptoms” which is located in the original table. See *Immunizations*, *supra* note 176. This omitted column describes the mild to severe symptoms that could be present when each disease is contracted, which is mirrored by the column describing the potential “Disease complications” arising from those symptoms. *Id.*

180. The DTaP vaccine combines protection against diphtheria, tetanus, and pertussis. *Id.* Similarly, the MMR combines protection against measles, mumps, and rubella. *Id.* After each vaccine name in the original table, the column reiterates the name of the disease prevented by each vaccine—i.e., the disease in the column left adjacent. These reiterations have been omitted for conciseness.

Pertussis [(whooping cough).]	DTaP vaccine	Air, direct contact	Pneumonia (infection in the lungs), death
Polio	IPV vaccine	Air, direct contact, through the mouth	Paralysis, death
Pneumococcal	PCV13 vaccine	Air, direct contact	Bacteremia (blood infection), meningitis (infection of the covering around the brain and spinal cord), death
Rotavirus	RV vaccine	Through the mouth	Severe diarrhea, dehydration
Rubella	MMR vaccine	Air, direct contact	Very serious in pregnant women—can lead to miscarriage, stillbirth, premature delivery, birth defects
Tetanus	DTaP vaccine	Exposure through cuts in skin	Broken bones, breathing difficulty, death ¹⁸¹

To identify the individuals who may be charged with the vaccine-refusal tax, the implementation must be more stringent than a check-off box on the IRS 1040 Tax Form. If this were the case, the tax would have no effect on increasing immunization rates because parents who currently check the box on personal-belief exemptions for school forms would similarly check the box again on their tax filings. Instead, supporting documentation such as a certificate of vaccination or certified letter from a health professional—similar to the documentation required to prove employer insurance coverage under the ACA—should be required along with the tax form.¹⁸²

To avoid the apportionment requirement of Article I,¹⁸³ the payment of a vaccine-refusal tax must mirror the individual mandate of the ACA and be “triggered by specific circumstances”¹⁸⁴—in this case, earning a certain amount of income but not maintaining the required immunization schedule. Similarly, because the taxing power is typically “limited to require[] . . . individual[s] to pay money into the Federal Treasury,”¹⁸⁵ the suggested tax should be levied and collected by the IRS. Having a tax “penalty” be collected by another agency, such as the child labor “tax”

181. *Id.*

182. Any requirement should also be mindful of the possibility that spot shortages of certain vaccines, as has happened in the past, may require that mandates be waived in times of shortages. See Lars Noah, *Triage in the Nation's Medicine Cabinet: The Puzzling Scarcity of Vaccines and other Drugs*, 54 S.C. L. REV. 741, 743–45 (2003) (describing how vaccine shortages following September 11, 2001—and similar shortages in the mid-1980's—posed a significant risk to public health).

183. U.S. CONST. art. I, § 9, cl. 4.

184. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 571 (2012).

185. *Id.* at 574.

collected by the Department of Labor in *Drexel Furniture*,¹⁸⁶ would open any vaccine-refusal tax to potential violations of the taxing power.

Like the mandate in *NFIB*, if the vaccine-refusal tax is paid timely, “the Government has no power to compel or [further] punish individuals” to conform to the underlying intent of the regulation.¹⁸⁷ While an additional tax burden may still cause significant hardship, the imposition of the tax nonetheless leaves individuals with the choice to receive the required immunizations or to pay a tax levied on their omission.¹⁸⁸ This implementation would mirror not only *NFIB*, but the Supreme Court rulings on state-implemented taxes as well. While the local tax in *Jacobson* was obviously not subject to the same limitations as the federal taxing power, it essentially allowed citizens who opposed the smallpox vaccine to purchase—for a relatively small price—a license to threaten the health of their neighbors.¹⁸⁹ Even more so, the compulsory requirements in *Zucht* appeared more coercive, and applied to a situation with far less an emergency, yet the Supreme Court still greenlighted the vaccination requirement.¹⁹⁰

B. Permitted Exemptions

For the vaccine-refusal tax to accomplish its primary goal of increasing national immunization rates, exemptions to the tax must be few. This begins with the removal of religious exemptions mirroring the actions of states such as California, Mississippi, and West Virginia. While it is unclear from case law whether the Supreme Court would specifically uphold an immunization law with no religious exemption, the Free Exercise doctrine has become less protective since the *Smith* decision in 1990. Under *Smith*, laws that are neutral and of general applicability, yet “infringe” upon the free exercise of religion, do not appear to violate the Free Exercise Clause of the First Amendment.¹⁹¹ In an effort to circumvent barring religious exemptions completely, some states have adopted “genuine and sincere” religious exemptions.¹⁹² However, exemptions framed in these terms have been rejected in lower courts for Establishment Clause problems relating to potential interpretations in the government’s definition of “sincerity.”¹⁹³ As such,

186. See *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38 (1922).

187. *Sebelius*, 567 U.S. at 574.

188. See *id.*

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

190. See *Zucht v. King*, 260 U.S. 174, 176–77 (1922).

191. See *Emp’t Div. v. Smith*, 494 U.S. 872, 879, 884–85 (1990).

192. See, e.g., *Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015).

193. See, e.g., *McCarthy v. Boozman*, 212 F. Supp. 2d 945, 950 (W.D. Ark. 2002) (adopting similar reasoning in a similar circumstance).

a vaccine-refusal tax of neutral and general applicability will have more success under the Free Exercise line of cases, which is losing its teeth as it trends away from its previous strict scrutiny standard.

As mentioned earlier, this Note does not advocate for the removal of medical exemptions or for stricter checks on the judgment of doctors who grant such exemptions. A recent study analyzing vaccination laws in California warns against the lingering potential for outbreaks in areas where medical exemptions increased 250% following the removal of all nonmedical exemptions.¹⁹⁴ However, the study notes that many of the areas that saw drastic increases in medical exemptions previously had the highest rates of Personal Belief Exceptions.¹⁹⁵ Overall, the study concluded that school immunization rates increased from 92.8% to 95.1% in the two years after nonmedical exemptions were removed.¹⁹⁶

A similar reaction will likely occur upon the implementation of a federal vaccine-refusal tax; however, there are steps that can be taken to mitigate this response. The WHO advocates that health professionals, especially community-based providers, “remain the most trusted advisor[s] and influencer[s] of vaccination decisions, and they must be supported to provide trusted, credible information on vaccines.”¹⁹⁷ If health professionals develop standardized methods for granting medical exemptions, then additional government intervention would not be necessary. Only if medical exemptions face as much abuse as current nonmedical exemptions may it be necessary to follow along with the few states that call for medical exemptions to be reviewed by additional state (or in this case federal) health officials.¹⁹⁸

CONCLUSION

Vaccines provide an “incredibly cost-effective preventive health service[.]”¹⁹⁹ “In addition to saving lives, vaccines prevent illness and reduce [societal] costs” related to necessary disease prevention methods that accompany outbreaks.²⁰⁰ According to estimates, routine childhood vaccinations among children born between 1994 and 2003 have prevented:

194. Salini Mohanty et al., *Experiences with Medical Exemptions After a Change in Vaccine Exemption Policy in California*, 142 PEDIATRICS 1, 2 (2018).

195. *Id.*

196. *Id.*

197. *Ten Threats to Global Health in 2019*, *supra* note 79.

198. *See* Devitt, *supra* note 51.

199. AM. PHARMACISTS ASS’N, *supra* note 88, at 3.

200. *Id.* at 3–4.

- 322 million cases of disease[;]
- 1.4 million hospitalizations[;]
- 56,300 deaths[;]
- \$4.2 billion of direct health care costs[; and]
- \$1.5 trillion of societal costs.²⁰¹

As vaccination rates continue to decrease, the financial and health impacts on public safety—for both those immunized and those not—are at risk.²⁰² To return vaccination rates to levels that maintain herd immunity thresholds, Congress must pass legislation to promote vaccination efforts, raise revenue, and fund the fight against outbreaks.

Currently, the entire public is responsible for the burden of funding these initiatives.²⁰³ That burden must shift and fall more squarely upon the individuals who refuse to acknowledge that remaining properly immunized against vaccine-preventable diseases is a fundamental necessity for protecting the public health. The global trend to increase vaccination rates and fight outbreaks has already resulted in similar fines and taxes as those advocated in this Note.²⁰⁴ Parents who, without a medical exemption, refuse to follow the mandatory childhood vaccination schedule must therefore be required to fund the public burden that their choice not to vaccinate creates.

201. *Id.*

202. *See* Orenstein et al., *supra* note 16.

203. Lo & Hotez, *supra* note 94, at 890.

204. *See supra* notes 22–24 and accompanying text.