

The Parents (Don't) Know Best: Increasing Immunization Access for Minors

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Over the past several years, immunization rates for diseases such as measles, mumps, tetanus, and others have sharply dropped. Decreasing immunization rates have caused a spike in several highly infectious diseases, including a 30% increase in measles infections worldwide.¹ The World Health Organization (WHO) lists “vaccine hesitancy” as one of its top ten global threats to health in 2019,² while the Center for Disease Control (CDC) has identified six measles outbreaks in the United States so far this year.³ “Anti-Vaxxers” offer various reasons for refusing immunizations, either for themselves or their children; many of their concerns stem from a now-discredited study purporting to link vaccines and autism.⁴ Social media sites allow vaccine opponents to share support and publish misinformation about vaccine safety, often reinforcing erroneous beliefs about the dangers of immunizations.⁵ Against the backdrop of ongoing measles outbreaks, a new phenomenon has emerged in the United States: minor children who want to receive vaccinations, but are prevented from doing so by their parents. One minor, Ethan Lindenberger, made national headlines when he posted on Reddit, an online discussion forum, to ask how he could receive vaccines without his mother’s consent.⁶

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¹ World Health Organization, *Ten Threats to Global Health in 2019*, <https://www.who.int/emergencies/ten-threats-to-global-health-in-2019> (last visited Mar. 11, 2019).

² *Id.*

³ Centers for Disease Control and Prevention, *Measles Cases and Outbreaks* (Mar. 11, 2019), <https://www.cdc.gov/measles/cases-outbreaks.html>.

⁴ Brian Deer, *Revealed: MMR Research Scandal*, Sunday Times, Feb. 22, 2004, as reprinted in Brian Deer Awarding-Winning Investigations, <http://briandeer.com/mmr/lancet-deer-1.htm> (last visited Mar. 5, 2019).

⁵ Ashley May, *Teen Who Vaccinated Himself Says Anti-Vaxx Mom Gets Misinformation from Facebook*, USA Today (Mar. 5, 2019, 11:34 AM), <https://www.usatoday.com/story/news/health/2019/03/05/anti-vaxx-moms-gets-fake-news-facebook-teen-says-congress/3065271002/>

⁶ *Id.* Several months later, Lindenberger testified before Congress on the dangers of vaccine misinformation. *Id.*

While states possess broad power to impose mandatory vaccinations, the federal government's authority is significantly more constrained. Because of this, the primary power to increase individual immunizations resides with the states, limiting possible "national" solutions. However, the federal government likely has sufficient authority to help minors like Ethan Lindenberger through the use of federal funds. By offering states increased immunization funding, the federal government can attach conditions on its use; namely, requiring the states to enact or modify minor consent laws to enable minors to receive immunizations without parental consent. While this change may not be dramatic, it would help minors nationwide whose lives have been placed at risk by the ill-informed decisions of their parents.

Minors seeking immunizations without parental consent generally face two barriers: statutory restrictions and cost restrictions. Only a person with the appropriate legal authority can consent to healthcare; as a general matter, this authority is limited to persons who have reached the age of majority (typically, 18 years old).⁷ Despite this limitation, many states have enacted laws providing for exceptions to the general rule, known as "minor consent laws."⁸ These laws vary widely and are often dependent on the minor's age, legal status, or the type of care sought.⁹ Some states require a determination of the minor's "maturity" prior to allowing their consent to medical treatment.¹⁰ Additionally, even where minors are able to consent to healthcare treatment, immunizations are not always included in the range of procedures eligible for the minor's

⁷ Abigail English et al., *Legal Basis of Consent for Health Care and Vaccination for Adolescents*, 121 PEDIATRICS S85, S85 (2008).

⁸ *Id.*

⁹ Abigail English et al., *State Minor Consent Laws: A Summary* 288-289 (3d ed. 2010). Examples of legal status include emancipated minors, married minors, and minors with children. Examples of types of care include emergency care, pregnancy-related care, HIV/AIDS care, and drug/alcohol care.

¹⁰ This is known as the "Mature Minor Doctrine." Doriane Coleman and Philip Rosoff, *The Legal Authority of Mature Minors to Consent to General Medical Treatment*, 131 PEDIATRICS 786, 789 (2013); *Providing Health Care to Minors Under Washington Law* (Jul. 10, 2015) <https://www.washingtonlawhelp.org/files/C9D2EA3F-0350-D9AF-ACAE-BF37E9BC9FFA/attachments/3924E318-9C45-4556-F8C9-89368DAE1E74/providing-health-care-to-minors.pdf>.

consent.¹¹ In some states, a minor can only consent to certain vaccines, while in others, the ability to consent to health care does not include any immunizations. Consequently, the ability of minors to obtain immunizations without parental consent is a complicated body of statutory and judge-made law with wide variation from state to state. This can confuse minors seeking immunizations and disincentivizes health care providers from supporting a minor patient's preference for receiving vaccines, lest the providers run afoul of their state's minor consent law.

Beyond the statutory limitations, the cost of immunizations poses a practical hurdle for minors who desire to receive vaccinations. Obviously, there is a monetary cost associated with obtaining immunizations; for example, Walgreens lists a single dose of the measles, mumps, and rubella (MMR) vaccine as \$99.99.¹² Obtaining "standard" immunizations can cost hundreds, if not thousands, of dollars, and few minors possess sufficient cash to pay for these vaccinations out of pocket. Minors enrolled in Medicaid are able to obtain all recommended immunizations, but may be subject to copays or fees depending on their state of residence.¹³ Additional federal programs, such as Vaccines for Children and Section 317 funding, help defray or eliminate the costs of immunizations; however, these programs are targeted at minors who lack the means to finance vaccines through other sources, such as Medicaid or private insurance.¹⁴ Minors whose parents have private insurance may be able to avoid direct costs for obtaining immunizations; however, relying on private insurance has its own risks, as parents/policyholders will likely receive an explanation of benefits disclosing the care that was provided.¹⁵ Thus, using private

¹¹ *State Minor Consent Laws*, *supra* note 10; see also English, *supra* note 7, at S87.

¹² Walgreens, *Price Menu*, <https://www.walgreens.com/topic/healthcare-clinic/price-menu.jsp> (last visited Mar. 13, 2019).

¹³ U.S. Department of Health & Human Services, *How to Pay*, Vaccines.gov, <https://www.vaccines.gov/getting/pay/index.html> (last visited Mar. 13, 2019).

¹⁴ Centers for Disease Control and Prevention, *Questions Answered on Vaccines Purchased with 317 Funds* (Feb. 17, 2016), <https://www.vaccines.gov/getting/pay/index.html>.

¹⁵ Abigail English and Carol Ford, *The HIPAA Privacy Rule and Adolescents: Legal Questions and Clinical Challenges*, 36 *Perspectives on Sexual and Reproductive Health* 80, 84 (2004).

insurance places a minor in an unenviable position of explaining to his/her parents why their anti-vaccination preferences were ignored. Regardless of the funding method through which a minor seeks to obtain immunizations, it is clear that each method presents practical hurdles to receiving vaccines.

Before diving into solutions which would enable minors to obtain immunizations without parental consent, it is worth outlining the extent of federal and state authority in the area of individual immunizations. Broadly speaking, the federal government's ability to require/mandate individual immunizations is limited.¹⁶ Congress's enumerated powers do not include any ability to regulate public health; thus, any federal authority to mandate immunizations must derive from another power, such as Congress's power to collect taxes, spend money, regulate commerce, or the Necessary and Proper Clause.¹⁷ However, in *National Federation of Independent Businesses v. Sebelius*, the Supreme Court effectively prohibited the federal government from controlling an individual's decisions with respect to healthcare.¹⁸ In *Sebelius*, the Court addressed a constitutional challenge to the individual mandate of the Affordable Care Act (ACA), which required individuals to purchase health insurance or face a penalty. While the Court ultimately upheld the individual mandate, it did so on narrow grounds, characterizing the individual mandate as a tax, rather than a statutory command.¹⁹ In particular, the Court found it important that the individual mandate (as characterized in its opinion) did not "give Congress [a] degree of control over individual behavior."²⁰ Channeling a common argument against the ACA, the Court implied that if the government might be permitted to

¹⁶ Wendy Parmet, *Gottlieb's Threat of Federal Vaccine Mandates: Questionable Legality, Poor Policy*, STAT NEWS (Feb. 28, 2019), <https://www.statnews.com/2019/02/28/gottlieb-federal-action-vaccine-mandates/>.

¹⁷ U.S. CONST. art. I, § 8.

¹⁸ 567 U.S. 519, 573 (2012).

¹⁹ *Id.* at 574.

²⁰ *Id.* at 573.

mandate health insurance, it could also mandate that individuals purchase cars or eat broccoli.²¹ After noting this absurdity, the Court concluded that with respect to health care, “Congress may [not] simply command individuals to do as it directs.”²² Thus, while *Sebelius* ultimately upheld the individual mandate, the Court’s language precludes the federal government from mandating individual health care actions; by extension, any attempt by the federal government to require individual immunizations would likely be struck down on similar grounds.

In contrast to the federal government, Supreme Court precedent grants wide latitude to the states with respect to immunization requirements. In *Jacobson v. Massachusetts*, the Court upheld a Massachusetts statute requiring all residents of Cambridge to receive smallpox vaccinations, noting “[w]e 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, acting in good faith for all, under the legislative sanction of the State.”²³ The Court concluded that requiring vaccinations was a valid exercise of state police power, leaving the only potential exception for cases where the vaccine may cause death or serious harm to the individual in question.²⁴ Several decades later, the Court affirmed the authority of the state to provide for compulsory vaccinations,²⁵ and later suggested that religious exemptions for vaccinations are not constitutionally required.²⁶ Thus, while the federal government’s ability to impose

²¹ *Id.* at 558 (“According to the Government, upholding the individual mandate would not justify mandatory purchases of items such as cars or broccoli because, as the Government puts it, ‘[h]ealth insurance is not purchased for its own sake like a car or broccoli; it is a means of financing health-care consumption and covering universal risks.’ But cars and broccoli are no more purchased for their ‘own sake’ than health insurance. They are purchased to cover the need for transportation and food.”).

²² *Id.* at 573.

²³ 197 U.S. 11, 37 (1905).

²⁴ *Id.* at 38-39.

²⁵ *Zucht v. King*, 260 U.S. 174, 175 (1922)

²⁶ *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) (“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.”)

immunizations requirements is circumscribed, Supreme Court precedent strongly suggests that the states have broad authority to mandate immunization requirements for their citizens.

In light of the federalism issues invoked by government immunization efforts, it appears that an ideal method to enable minors to obtain vaccinations on a nationwide scale could come through federal pressure on state legislatures. Though *Sebelius* likely prevents direct federal action to accomplish this goal, it does not preclude indirect federal action, such as attaching conditions to federal funds received by the states. The Supreme Court addressed Congress's use of its spending powers in this manner in *South Dakota v. Dole*, where it permitted Congress to attach conditions to federal highway funds appropriated for state use; specifically, Congress asserted that funds would not be distributed unless the state in question raised its drinking age to 21 years old.²⁷ The Court noted that “objectives not thought to be within Article I’s ‘enumerated legislative fields,’ may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.”²⁸ While the Court contemplated that at a certain point, the “financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion,’” it concluded that the “mild encouragement” used in *Dole* did not reach an unconstitutional threshold.²⁹ Notably, the Court conditioned Congress's use of its spending power on the pursuit of broader constitutional goals: “the exercise of the spending power must be in pursuit of ‘the general welfare.’”³⁰ In this sense, *Dole* supports the use of conditional federal funding to encourage state action enabling minors to receive immunizations without parental consent; as in *Dole*, Congress's purpose in attaching the conditions would be to promote “the general welfare.”

²⁷ 483 U.S. 203 (1987)

²⁸ *Id.* at 207.

²⁹ *Id.* at 211.

³⁰ *Id.* at 207.

Despite *Dole*'s approval of the coercive use of Congress's spending power, *Sebelius* suggests that there is an upper limit to such coercion; in other words, Congress's attempt to compel state action cannot be too "aggressive." In *Sebelius*, the Court addressed a separate portion of the ACA authorizing an expansion of Medicaid programs administered by the states, but largely funded by the federal government.³¹ The ACA authorized additional federal funding for the Medicaid expansion; however, if a state declined to accept the increased funding and expand their programs, the statute permitted the federal government to withhold all of that state's Medicaid grants, including those under the already-existing program.³² Characterizing this provision as a "gun to the head," the Court distinguished *Dole*, holding that the financial inducement offered for the Medicaid expansion crossed the threshold into unconstitutional compulsion.³³ Taken together, *Dole* and *Sebelius* suggest there is a "sweet spot" for the coercive use of Congress's spending power: conditional federal funding may be used to induce states to adopt regulations that the federal government may not otherwise implement directly; however, this incentive may not be so compelling as to leave the states with no real option other than to accept federal funds and alter their regulations.

Despite the constitutional limitations on the federal government's power to mandate immunizations and the coercive use of its spending power on the states, sufficient maneuver room exists to offer increased immunization funding to the states, contingent on their adoption of measures that will allow minors to obtain immunizations without parental consent. If Congress pursued such an objective, it would be employing its spending power to promote "the general welfare," which was already sanctioned as an appropriate goal of indirect pressure in *Dole*. To

³¹ *Sebelius*, supra note 18, at 575.

³² *Id.* at 580.

³³ *Id.* at 580-82. ("The threatened loss of over 10 percent of a State's overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.")

achieve this goal of increased immunization access for minors, Congress could authorize increased federal funding for immunization programs. Several federal programs already exist, such as Vaccines for Children and Section 317 Funding³⁴; to simplify implementation, Congress could elect to use or modify one of these programs as a delivery vehicle for the increased funding. As a condition for receiving additional funding, the federal government could require states to enact a minor consent statute that permits minors to receive immunizations without parental consent. As a “floor,” the federal government should require that states enact a version of the mature minor doctrine, allowing a minor who understands the benefits and consequences of immunizations to consent to receiving them. Beyond this floor, states could choose to enact broader minor consent statutes at their own discretion. Additionally, Congress could require that the increased funding be directed, in part or whole, to defray the costs of vaccines for minors who are obtaining immunizations without parental consent. This would allow minors to obtain immunizations without setting up a potential showdown with their anti-vaccination parents. As a cautionary note, any increased federal funding for immunizations must be structured in a way that leaves states free to accept or reject it; in other words, Congress cannot coerce states to accept increased immunization funding by threatening to withhold funds in other areas. If increased federal funding for immunizations follows the *Dole* model, it will remain within the limits of Congress’s spending power.

In light of the resurgence of measles and other preventable diseases in the U.S. today, an effort to allow minors increased access to immunizations may appear to be an underwhelming response. While *Dole*, at its logical extreme, suggests federal government could use its spending

³⁴ Centers for Disease Control and Prevention, *Vaccines for Children Program (VFC)* (Feb. 18, 2016), <https://www.cdc.gov/vaccines/programs/vfc/about/index.html>; *Questions Answered on Vaccines Purchased with 317 Funds*, *supra* note 17.

power to coerce the states to enact mandatory vaccination regimes, the Court's discussion of the individual mandate in *Sebelius* strongly suggests that such action would not survive judicial scrutiny, as it would be an indirect attempt to compel individuals to take certain health care actions. Further, the political coercion necessary to force states to impose mandatory immunization programs would likely require Congress to impose significant pressure, increasing the possibility that such pressure reaches or exceeds the threshold invalidated by the Court in *Sebelius*. Consequently, in attempting to increase the number of individual immunizations, it appears that "less is more" is the best approach for the federal government. Lacking direct power of its own, the federal government must entice, but not force, states to adopt measures to increase immunization rates. Allowing minors to obtain immunizations without parental consent is one such measure.

While increasing federal immunization funding and expanding minor consent to immunizations seems modest in scope, it is a positive step towards increasing nationwide immunization rates within the federal government's limited powers. More importantly, it would provide unvaccinated minors access to immunizations, reducing preventable health risks caused by the ill-informed decisions of their parents.