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2020

Vaccine Administration and Constitutional Protections: Substantive Due Process and HPV Prevention

Valerie Mayzelshteyn

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Introduction:

In 1905, the United States Supreme Court held that states may use their inherent police power to require individuals to get vaccinated.¹ While a growing movement of opposition toward vaccination of children has been building for years, the fact remains that a majority of individuals still opt to vaccinate their children against infectious diseases, such as measles, mumps, and rubella (MMR).² However, one vaccine has been met with more reluctance than most despite its proven efficacy at preventing life-threatening forms of cancer if administered prior to a person's contact with the virus: the Human Papillomavirus (HPV) vaccine.

While states routinely require vaccination for other diseases in order for children to attend public schools, albeit with medical exemptions, and in some states religious or philosophical exemptions to these general requirements, states are hesitant to do the same for the HPV vaccine despite the profound effect that administration of the vaccine on a national scale would have on public health. This reluctance largely stems from the nature of the HPV infection itself and the subsequent opposition from parents toward the vaccine. Because HPV spreads through sexual contact, states do not for the most part require parents to vaccinate their children against HPV in order for their children to attend school. Doing so would surely implicate some constitutional concerns, namely in regard to the states' involvement in family decision-making regarding childrearing.

¹ *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

² David W. Bradford, Anne Mandich, *Some State Vaccination Laws Contribute to Greater Exemption Rates and Disease Outbreaks in the United States*, 34 *Health Affairs*, 8. "Health officials attest that immunizations are among the most successful interventions in public health" (The article also delves into the complexities of declining MMR immunization rates recently, which will be discussed in greater detail.)

Regardless of the controversy surrounding the vaccine, it remains an extremely effective way to avoid many types of cancers that are preventable. Therefore, states do have a cognizable public health interest that warrants involvement in the parent child relationship as it applies to HPV vaccination. Indeed, four jurisdictions have mandated HPV vaccination as a prerequisite for middle school attendance, with varying degrees of effectiveness in improving overall HPV vaccination rates.³ Reasons for success and failure of these jurisdictions will be further assessed in later sections of this paper.

States have an interest in protecting the public safety, health, and welfare of society as a whole and courts generally defer to states' assessments of measures for doing this through the rational basis review recognized in *Jacobson v. Massachusetts*⁴. Aside from the *Jacobson* decision, which specifically authorizes the enactment of vaccination laws, there are other constitutional precedents, which will be discussed in greater detail, that allow states to intervene in the parent child relationship in certain situations where such intervention is appropriate for the greater good of the community or for the best interest of the child. In order to promote HPV vaccination among adolescents for the benefit of public health, states should actively enforce HPV vaccination laws that require children to be vaccinated prior to entry into the seventh grade. These laws should only provide very limited medical exemptions to remain effective. Enacting mandatory school-entry HPV vaccination laws is constitutional because parental authority over decision making regarding their children is not absolute and the state can intervene where appropriate.⁵ Further, such laws would pass rational basis constitutional review established for

³ HPV Vaccine: State Legislation and Statutes, National Conference of State Legislatures, (2019).

⁴ *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

⁵ *Prince v. Massachusetts*, 321 U.S. 158.

vaccination laws under *Jacobson* because they are rationally related to a very important interest: the prevention of HPV transmission and subsequent prevention of HPV-caused cancers.

Human Papillomavirus Overview:

HPV refers to a group of more than two hundred viruses that are sexually transmitted.⁶ It is the most common sexually transmitted infection in the United States and generally does not cause any symptoms.⁷ Although most people who become infected with HPV do not know that they have it and their immune systems are able to fight off the infection naturally, the infection may linger in some people and can ultimately cause normal cells to develop into abnormal precancerous cells, which can then develop into cancer if left untreated.⁸ There are two categories of HPV: (1) low risk HPV; and (2) high risk HPV.⁹ Low risk HPV can cause genital warts and other symptoms, but does not cause the growth of cancer cells, whereas high risk HPV is labeled as such specifically because it can lead to cancer over time.¹⁰ High risk HPV strains are classified as group one carcinogens by the International Agency for Research on Cancer (IRAC) because of their proven role in the development of malignant neoplasms.¹¹ An HPV-associated cancer is a cellular type of cancer that is diagnosed in a part of the body where HPV is often found, such as the cervix, vagina, vulva, penis, anus, rectum, or back of the throat.¹² By

⁶ *HPV and Cancer*, National Cancer Institute (October 8, 2019), <https://www.cancer.gov/about-cancer/causes-prevention/risk/infectious-agents/hpv-and-cancer#what-is-hpv>.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Robert Jach, Antoni Basta, Jan Kotarski, Janina Markowska, Tomasz Paszkowski, Romuald Dębski, Wojciech Rokita, Witold Kędzia, Krystyna Kiszka, *Ten Years of Anti-HPV Vaccinations: What Do We Know?* (November 15, 2016).

¹² *How Many Cancers Are Linked with HPV Each Year?*, Center for Disease Control and Prevention, (August 2, 2019), <https://www.cdc.gov/cancer/hpv/statistics/cases.htm>.

contrast, an HPV-attributable cancer is one that is probably caused by HPV; for example, nearly all cervical cancer is caused by HPV, so cervical cancer is considered an HPV-attributable cancer.¹³ According to a Center for Disease Control and Prevention (CDC) study, there are an average of 43,999 cases of HPV-associated cancer among men and women in the United States per year, with 79% of those cases probably caused by a strain of HPV.¹⁴ In other words, there is a causal nexus between HPV and development of cancer over time. The mean age that someone is infected with HPV is unknown, but is estimated to be decades before the diagnosis of cancer takes place.¹⁵ In fact, most new HPV infections occur in adolescents and young adults.¹⁶ While condoms can reduce the likelihood of transmission of HPV and screening can be effective in detecting the presence of HPV-caused abnormal cells before they turn into cancer, government health-focused agencies, such as the CDC, and medical professionals alike encourage vaccination as the most effective means of protection against HPV-caused cancer.¹⁷ Because HPV vaccinations do not treat existing HPV infections, but help prevent new infections from occurring, the notion behind earlier administration of the vaccine is that it protects people before they are likely to have been exposed to any strains of the virus.¹⁸

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Elissa Meites, MD, Peter G. Szilagyi, MD, Harrell W. Chesson, PhD, Elizabeth R. Unger, PhD, José R. Romero, MD, Lauri E. Markowitz, MD, *Human Papillomavirus Vaccination for Adults: Updated Recommendations of the Advisory Committee on Immunization Practices*, Center for Disease Control and Prevention (August 16, 2019).

¹⁶ *Id.*

¹⁷ HPV and Cancer, National Cancer Institute (October 8, 2019), <https://www.cancer.gov/about-cancer/causes-prevention/risk/infectious-agents/hpv-and-cancer#what-is-hpv>.

¹⁸ *Should I Get the HPV Vaccine?*, Planned Parenthood, (2019), <https://www.plannedparenthood.org/learn/stds-hiv-safer-sex/hpv/should-i-get-hpv-vaccine>

Emergence of the HPV Vaccine:

In the past decade, three prophylactic HPV vaccines have been licensed for use in the United States: 9-valent Gardasil 9 and quadrivalent Gardasil, both produced by Merck, and bivalent Cervarix, which is produced by GlaxoSmithKline.¹⁹ As of late 2016, Gardasil 9 (Gardasil) is the only one that has been used in the United States because it protects against the most strains of HPV as compared to the other two vaccines.²⁰ Gardasil protects against HPV strains 16 and 18, which cause cancer and are prevented by the other HPV vaccines, as well as five other high-risk strains and two additional low-risk strains that can cause anogenital warts.²¹ As a result of this efficacy, the CDC recommends two doses of Gardasil be given to children between the ages of 11-12 years old.²² However, the recommendations further note that “catch-up” vaccinations for people who did not get vaccinated at that age are encouraged up through the age of 26.²³ The vaccine was initially introduced for women, but the CDC now recommends it for men as well.²⁴ The HPV vaccine is often described as “the first vaccine against cancer” because of its ability to prevent numerous strains of HPV infection, seven of which are high risk and can potentially cause cancer.²⁵

¹⁹ Elissa Meites, MD, Peter G. Szilagyi, MD, Harrell W. Chesson, PhD, Elizabeth R. Unger, PhD, José R. Romero, MD, Lauri E. Markowitz, MD, *Human Papillomavirus Vaccination for Adults: Updated Recommendations of the Advisory Committee on Immunization Practices*, Center for Disease Control and Prevention (August 16, 2019).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ LE Markowitz, EF Dunne, M Saraiya, *Human papillomavirus vaccination: recommendations of the Advisory Committee on Immunization Practices (ACIP)*.

²⁵ Human Papillomavirus (HPV) Vaccines, National Cancer Institute (September 9, 2019), <https://www.cancer.gov/about-cancer/causes-prevention/risk/infectious-agents/hpv-vaccine-fact-sheet#what-are-hpv-vaccines>

The vaccine is most effective when it is administered before potential exposure to the virus through sexual activity.²⁶ Therefore, states have an important interest in promoting public health by encouraging administration of the vaccine to adolescents during the CDC recommended age time frames. However, despite the interest in preventing the spread of HPV and support for the vaccine's safety and success in doing so, the proportion of adolescents who receive the vaccine is plateauing as compared to other measles, mumps, rubella (MMR) vaccines, which are commonly required for school attendance.²⁷ The reason that states have had more success administering MMR vaccines is that these vaccines are generally required by law for school attendance as opposed to the HPV vaccine, which is a noteworthy distinction that will be discussed further. However, aside from this varied policy approach, scholars and medical professionals studying the reluctance to embrace the HPV vaccine as readily as other vaccines focus on two bases of opposition to the vaccine: (1) general anti-vaccination activists; and (2) people who are morally and religiously opposed to *this* vaccine specifically.²⁸ Understanding the basis for the opposition to the HPV vaccine is an essential step in overcoming the parental opposition on such a large-scale national basis.

Opposition to the HPV Vaccine:

General anti-vaccine arguments stem from a number of different moral, religious, and social concerns. A 2015 study looked at the Facebook profiles of 197 people who posted

²⁶ *Id.*

²⁷ Leila Barraza, JD, MPH, Kim Weidenaar, JD, Doug Campos-Outcalt, MD, MPA, Y. Tony Yang, ScD, LLM, MPH, *Human Papillomavirus and Mandatory Immunization Laws*, Public Health Rep. 2016 Sep-Oct; 131(5): 728-731.

²⁸ Rebecca E. Skov, *Examining Mandatory HPV Vaccinations in School-Aged Children*, 62 Food & Drug L.J. 805 (2007).

comments articulating various anti-vaccination statements on a pediatric center's post that encouraged HPV vaccination for children.²⁹ The study ultimately narrowed down the central and overarching arguments into four categories of opposition: (1) suspicion about the scientific community coupled with a concern about personal liberty, (2) preference for homeopathic remedies over vaccination, (3) perceived safety risks associated with vaccines, and (4) suspected government conspiracy about vaccines as a whole.³⁰ According to the findings of this study, anti-vaccination groups discourage abiding by the "blanket approach of public health messages that encourage vaccination."³¹ Given the growing number of anti-vaccine activists and their ability to disseminate their message through social media platforms, it is not surprising that many parents opt to use vaccine exemptions even though there is still much support and encouragement for vaccinations as a whole coming from public health organizations throughout the country.

A 2018 John Hopkins University School of Medicine study conducted in response to HPV vaccination reluctance among parents discovered the following as prevailing reasons: safety concerns, lack of necessity, lack of knowledge, and absence of physician recommendation.³² The HPV vaccine is in an even more complicated position within the overall anti-vaccination context, which may explain the plateau effect taking place despite its acknowledged effectiveness among members of the medical community.³³ While anti-vaccination activists generally oppose most vaccines for the reasons cited above, the HPV

²⁹ BL Hoffman, *It's not all about autism: the emerging landscape of anti-vaccination sentiment on Facebook*, Vaccine 2019, March 3, 2019.

³⁰ *Id.*

³¹ Molly Walker, *Anti-Vaxxers: Singular in Focus, Varied in Argument*, Medpage Today, March 21, 2019.

³² Anne Rositch, M.S.P.H., Ph.D., *The HPV Vaccine: Why Parents Really Choose to Refuse*, John Hopkins University School of Medicine, October 24, 2018.

³³ *Id.*

vaccine is unique because it combines this general safety concern toward vaccinations with morality concerns linked to teenage sexuality and HPV's status as a sexually transmitted infection.³⁴ Some parents do not want to vaccinate their children against HPV because they are concerned the vaccine will give their children license to engage in sexual activity or they disagree with the vaccine's administration being necessary at such a young age.³⁵ Therefore, the HPV vaccine has an additional hurdle as compared to other vaccines that are recommended for children. However, despite the resistance toward the vaccine, a number of states have found it to be in the best interests of society as a whole to try and implement programs that encourage HPV vaccination in children because of its ability to prevent deadly diseases in the future. The approaches have varied from educational campaigns to vaccine mandates, with diverse rates of success in achieving the overall goal of HPV vaccination in spite of parental reluctance and constitutional arguments against it.

Distinguishing MMR Vaccines and the HPV Vaccine:

In *Jacobson v. Massachusetts*, the Supreme Court held that states may use their inherent police power to require individuals to get vaccinated in order to prevent the spread of infectious diseases.³⁶ The Court deferred to states' judgment about vaccination mandates and recognized that states can use their police powers to acknowledge and address public health concerns.³⁷

Although immunization efforts have proven to be effective over time since the advent of the first

³⁴ Leila Barraza, JD, MPH, Kim Weidenaar, JD, Doug Campos-Outcalt, MD, MPA, Y. Tony Yang, ScD, LLM, MPH, *Human Papillomavirus and Mandatory Immunization Laws*, Public Health Rep. 2016 Sep-Oct; 131(5): 728-731.

³⁵ *Id.*

³⁶ *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (holding a Massachusetts statute that required its citizens to be vaccinated against smallpox is a valid exercise of the state's police power).

³⁷ *Id.*

vaccines, there is no question that there is a growing number of parents who are skeptical of vaccinations in general, as discussed in the above sections, for a variety of reasons.³⁸³⁹ With that in mind, states have had a greater degree of success with general vaccination requirements than they have been with urging HPV vaccination. A study of nationwide measles, mumps, and rubella (MMR) vaccination requirement approaches demonstrated that making vaccination a prerequisite for children to attend schools points to the ways in which states work to implement their public health agendas.⁴⁰ Although criticized as intrusive by some people, school entry required vaccine mandates are widely successful at increasing vaccination rates among the general public and are embraced by Supreme Court precedent.⁴¹⁴²

Certain states' efforts are more successful than others, especially those who make it more difficult for parents to obtain exemptions for the vaccines.⁴³ States that require medical authorization from qualifying medical professionals in order for a medical exemption and those who require a written statement from a professional verifying a religious conflict for a religious exemption have proven to have lower exemption rates than states who allow parents to opt out of vaccines on a purely philosophical basis.⁴⁴

³⁸ David W. Bradford, Anne Mandich, *Some State Vaccination Laws Contribute to Greater Exemption Rates and Disease Outbreaks in the United States*, 34, *Health Affairs*, 8.

³⁹ Molly Walker, *Anti-Vaxxers: Singular in Focus, Varied in Argument*, *Medpage Today*, March 21, 2019.

⁴⁰ David W. Bradford, Anne Mandich, *Some State Vaccination Laws Contribute to Greater Exemption Rates and Disease Outbreaks in the United States*, 34, *Health Affairs*, 8.

⁴¹ Rebecca B. Perkins, Mengyun Lin, Sherrie F. Wallington & Amresh D. Hanchate, *Impact of school-entry and education mandates by states on HPV vaccination coverage: Analysis of the 2009–2013 National Immunization Survey-Teen*, *Human Vaccines & Immunotherapeutics*, 12:6, 1615-1622 (2016).

⁴² *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

⁴³ *Id.*

⁴⁴ *Id.*

Attempts to Implement HPV Vaccine Requirement:

The CDC released its recommendations about HPV vaccination in 2006.⁴⁵ Since then, 42 states have attempted to introduce some form of legislation pertaining to HPV vaccination.⁴⁶ Twenty-five states have enacted legislation about funding and educating the public and school children about the HPV vaccine.⁴⁷ As early as 2007, Washington signed into law a requirement that every parent of a sixth grade girl be provided with information as to where the child can be vaccinated against HPV, while not mandating the vaccine itself.⁴⁸ Increased education efforts continued to pass throughout other states, including Colorado, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Nevada, New Mexico, New York, North Carolina, North Dakota, Oregon, South Dakota, Texas, Utah, Washington and Wisconsin.⁴⁹ Michigan and Ohio were the first states to attempt to mandate the HPV vaccination as a prerequisite for girls entering the sixth grade, but both measures failed in those states.⁵⁰ As of today, only Rhode Island, Virginia, Washington D.C., and most recently Hawaii, implemented HPV vaccine mandates as prerequisites for school attendance.⁵¹⁵² However, the success of these mandates is debatable given the ease at which exemptions are available, as discussed in the following case study analysis of the four mandates individually.

⁴⁵ HPV Vaccine: State Legislation and Statutes, National Conference of State Legislatures, (2019).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ HPV Vaccine: State Legislation and Statutes, National Conference of State Legislatures, (2019).

⁵² Students will have to meet new vaccine requirements next year, Hawaii News Now, August 27, 2019, <https://www.hawaiinewsnow.com/2019/08/27/students-will-have-meet-new-vaccine-requirements-next-school-year/>

Four “Success” Stories?

1. *Washington D.C.*

Washington D.C. mandated HPV vaccination through its legislative process when it enacted the Human Papillomavirus Vaccination and Reporting Act of 2007.⁵³ The purpose of the Washington D.C. legislation is the following: “To require a public education campaign to educate the public regarding the human papillomavirus and the vaccine for this virus, to require a certification by the Department of Health that the vaccine is safe and efficacious, to establish a human papillomavirus vaccination program for females entering grade 6, and to require that a vaccination reporting requirement be established by the Department of Health.”⁵⁴ According to this statute, students entering the sixth grade are required to receive the first of three HPV vaccine doses by the time they are 11 years old unless their parents choose to opt out.⁵⁵ The Washington D.C. mandate originally only applied to girls entering the sixth grade, but was amended in 2014 to include boys as well after more research on the HPV vaccine demonstrated it to be effective for all children.⁵⁶ Despite having written legislation that mandates HPV vaccination in school-age children, Washington D.C.’s HPV vaccination rates have not increased substantially, largely as a result of its broad exemptions to the vaccine requirement itself.⁵⁷ According to Washington D.C.’s HPV vaccination law, parents are given the choice to exempt their children from the HPV requirement by filing out an annual opt-out form through their

⁵³ D.C. Law 17-10: Human Papillomavirus Vaccination and Reporting Act of 2007.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Leila Barraza, JD, MPH, Kim Weidenaar, JD, Doug Campos-Outcalt, MD, MPA, Y. Tony Yang, ScD, LLM, MPH, *Human Papillomavirus and Mandatory Immunization Laws*, Public Health Rep. 2016 Sep-Oct; 131(5): 728-731.

⁵⁷ *Id.*

school system.⁵⁸ This form details HPV vaccination information as well as three broad exemptions to the HPV vaccine requirement, which the parent can then sign and return to the school if one of the exceptions applies. The exemptions include the following:

“(1) when the parent or guardian objected in good faith, in writing, asserting that the vaccine would violate his or her religious beliefs; (2) when the child’s physician certified in writing that the vaccination would be medically inadvisable; and (3) when the parent or guardian opted out for any reason by signing a document stating that the parent or guardian was informed of the vaccination requirement and chose not to participate.”⁵⁹⁶⁰

In other words, the exemption options are religious, medical, and HPV vaccine-specific objections and therefore give a parent who does not wish to vaccinate his or her child a wide breadth of reasons to choose from in order to avoid vaccination. Specifically, the third objection, which allows the guardian to opt out for any reason as long as he or she was informed of the vaccination requirement and chose not to vaccinate the child, makes the Washington D.C. HPV vaccine mandate ineffective because a parent can choose not to comply with it based on “any reason.”

According to a 2016 study which analyzed HPV vaccination rates among girls throughout the country between 2003-2009, girls residing in Washington D.C. and Virginia (both of which have HPV vaccine mandates as a condition for school entry) did not have higher HPV series initiation or completion rates than girls residing in states without such mandates.⁶¹ While

⁵⁸ D.C. Law 17-10: Human Papillomavirus Vaccination and Reporting Act of 2007.

⁵⁹ Bill B17-30. 17, 70th Council Session (D.C. 2007).

⁶⁰ Leila Barraza, JD, MPH, Kim Weidenaar, JD, Doug Campos-Outcalt, MD, MPA, Y. Tony Yang, ScD, LLM, MPH, *Human Papillomavirus and Mandatory Immunization Laws*, Public Health Rep. 2016 Sep-Oct; 131(5): 728-731.

⁶¹ Rebecca B. Perkins, Mengyun Lin, Sherrie F. Wallington & Amresh D. Hanchate, *Impact of school-entry and education mandates by states on HPV vaccination coverage: Analysis of the*

Washington D.C. puts the burden on parents to opt out of vaccination, the language of the opt out provision is so broad that it appears that many parents are choosing to opt out based on the resulting statistics, thus weakening the effectiveness of the legislation.⁶² The opt out language makes the Washington D.C. HPV vaccination mandate more akin to the HPV education laws that require schools to provide parents with information regarding HPV in order for them to make a conscious choice about vaccination rather than a stringent requirement for school participation. The HPV education laws throughout the country similarly have had little positive effect on increasing HPV vaccination, according to the study, and therefore a “mandate” that mimics such legislation is unsurprisingly ineffective as well.⁶³

2. *Virginia*

Virginia also faces similar issues that Washington D.C. faces in the wake of its own HPV vaccination requirement, namely that Virginia’s vaccination rates are not much higher than those of states without mandates.⁶⁴ Virginia took a legislative approach to the HPV vaccine by adding three required doses of the HPV vaccine for girls, but also including a lenient opt out provision.⁶⁵ Unlike Washington D.C.’s HPV vaccine requirement, Virginia’s immunization requirement is initially less stringent in scope in that it only requires girls to get the three-dose vaccination.⁶⁶ The law was also later amended by Virginia Governor Timothy Kaine to allow exemptions as

2009–2013 *National Immunization Survey-Teen, Human Vaccines & Immunotherapeutics*, 12:6, 1615-1622, (2016).

⁶² *Id.* at 1618.

⁶³ *Id.* at 1616.

⁶⁴ *Id.*

⁶⁵ Va. Code. Ann. §32.1-46 (2007).

⁶⁶ *Id.*

long as parents reviewed education information about HPV and signed waivers for the vaccine.⁶⁷ Although Virginia took a proactive approach toward increasing HPV vaccination rates, a University of Virginia study notes that opt-outs to the vaccination requirement have steadily become the norm rather than the exception as originally intended.⁶⁸ The study attempts to reconcile Virginia's 27.9 percent HPV vaccination rate with the nation's 38 percent HPV vaccination rate among girls despite Virginia's progressive legislative steps.⁶⁹ Even though the HPV vaccine is the most effective means of preventing cervical cancer in the future, it is difficult for some parents to look that far in advance to rationalize vaccinating the child—the rationale of “my child is not sexually active and therefore does not need it” continues to permeate this sphere of vaccination according to the study.⁷⁰ The study finds that Virginia parents may be especially skeptical to HPV vaccination as opposed to parents nationwide and refers to pockets throughout the state in which vaccination is entirely opposed.⁷¹

Because Virginia's HPV vaccine opt out conditions are so lax, parents can reject HPV vaccination of their children simply because they oppose the specific vaccine and are willing to sign a waive after reading the risks associated with HPV. The Virginia Code goes over immunization exemptions, listing religious and medical exemptions generally. However, it also has a section with a specific provision that pertains to HPV:

⁶⁷ Leila Barraza, JD, MPH, Kim Weidenaar, JD, Doug Campos-Outcalt, MD, MPA, Y. Tony Yang, ScD, LLM, MPH, *Human Papillomavirus and Mandatory Immunization Laws*, Public Health Rep. 2016 Sep-Oct; 131(5): 728-731.

⁶⁸ Christine Phelan Kueter, *Study Seeks to Understand Why Virginia Girls Aren't Getting HPV Vaccine*, UVA Today (February 3, 2015).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

“Because the human papillomavirus is not communicable in a school setting, a parent or guardian, at the parent's or guardian's sole discretion, may elect for the parent's or guardian's child not to receive the HPV vaccine, after having reviewed materials describing the link between the human papillomavirus and cervical cancer approved for such use by the board.”⁷²

This language in effect creates the same broad HPV vaccine specific exemption that was present in the Washington D.C. HPV vaccination opt-out form. Such language fails to give the law meaning, as parents can choose to not comply with it for any reason. The law also does not acknowledge boys at all and does not require documentation of vaccination as a prerequisite for children to attend middle school, as is required by the law in regard to other mandated vaccinations for school-entry, so there is no check on the requirement prior to school entry to begin with.⁷³ Thus, like the Washington D.C. HPV vaccination mandate, the Virginia legislation promoting HPV vaccination is virtually ineffective at encouraging increased vaccination rates among young girls because it allows HPV-specific anti-vaccination sentiments alone to overpower the legislation.

3. *Rhode Island*

Rhode Island took a different approach than Washington D.C. and Virginia in that it went through its state regulatory process rather than through its legislature.⁷⁴ After the CDC Advisory Committee on Immunization Practice recommended the HPV vaccination be given to 11-12 year

⁷² Va. Code. Ann. §5.110-80.

⁷³ Leila Barraza, JD, MPH, Kim Weidenaar, JD, Doug Campos-Outcalt, MD, MPA, Y. Tony Yang, ScD, LLM, MPH, *Human Papillomavirus and Mandatory Immunization Laws*, Public Health Rep. 2016 Sep-Oct; 131(5): 728-731.

⁷⁴ *Id.*

old children, the Rhode Island Department of Health started routinely implementing statewide usage of the vaccine until ultimately requiring the vaccine in order for children to attend school.⁷⁵ Rhode Island's regulatory process provides parents the option to opt out for medical and religious reasons.⁷⁶ Medical exemptions must be signed by a qualifying health practitioner as defined by Rhode Island's regulations.⁷⁷ Notably, Rhode Island does not offer the same broad HPV-specific exemption that both Virginia and Washington D.C. offer parents.

The end result is more promising than the former examples of HPV vaccination mandates. By the end of 2015, 74 percent of Rhode Island seventh graders received the HPV vaccine, which was up from just 56.5 percent of girls and 43.2 percent of boys prior to the vaccination requirement.⁷⁸ Looking at Rhode Island's resulting HPV vaccination statistics as compared to the results of Washington D.C. and Virginia, it is evident that having an HPV-specific exemption as part of the state HPV mandate weakens the effectiveness of the mandate, making it practically ineffective. Unlike Virginia, Rhode Island's HPV vaccine mandate encompasses boys as well as girls, so the scope of the vaccine's coverage is broader and thus applies to more children.⁷⁹ Rhode Island's approach, which still allows for medical and religious opt-outs, treats the HPV vaccine the way that it treats other MMR vaccines, and is therefore more effective in encourage HPV vaccination of children statewide.

⁷⁵ Rhode Island Immunization Case Study, National HPV Vaccination Roundtable.

⁷⁶ *Id.*

⁷⁷ Leila Barraza, JD, MPH, Kim Weidenaar, JD, Doug Campos-Outcalt, MD, MPA, Y. Tony Yang, ScD, LLM, MPH, *Human Papillomavirus and Mandatory Immunization Laws*, Public Health Rep. 2016 Sep-Oct; 131(5): 728-731.

⁷⁸ Rhode Island Immunization Case Study, National HPV Vaccination Roundtable.

⁷⁹ *Id.*

4. Hawaii

Hawaii is the most recent state to amend its school vaccination law to include proof of HPV vaccine initiation prior to the start of a child's seventh grade year as a requirement for school attendance.⁸⁰ Hawaii's approach is more similar to Rhode Island's approach than it is to the legislation enacted by Washington D.C. or Virginia.⁸¹ Hawaii's HPV mandate applies to both boys and girls.⁸² Hawaii does allow exemptions for religious or medical reasons, but does not provide a separate HPV vaccine-based exemption to the law.⁸³ Hawaii's HPV mandate does not go into effect until July 1, 2020, so there are no available statistics to demonstrate its effect on HPV vaccination rates at this time, but it will probably be more successful than Washington D.C. or Virginia's mandates because it encompasses more children in its requirement provisions and does not allow for HPV-specific exemptions.⁸⁴

Constitutional Boundaries of State Intervention in the Parent-Child Relationship:

HPV vaccine mandates are an effective means of assuring that members of society take preventative measures to avoid HPV-caused diseases, but it is worth noting that forcing people to vaccinate their children raises a number of constitutional concerns, specifically those based on encroachment on individual due process rights under the United States Constitution. The Fifth Amendment states that "no person shall be... deprived of life, liberty, or property without due process of law."⁸⁵ This notion is also applied to the states through the Fourteenth Amendment,

⁸⁰ Hawaii Administrative Rules, Chapter 11-157, Amended April 15, 2019.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ U.S. Const. Amend. V.

which similarly dictates that “nor shall any State deprive any person of life, liberty, or property, without due process of law.”⁸⁶ The Due Process Clause of the Constitution has been interpreted to apply to a number of protected privacy interests throughout the history of its constitutional interpretation by the United States Supreme Court. These privacy interests are not expressly stated in the Constitution, but are located in the penumbra of its words and encompass such areas that are deemed private and fundamental to individuals.⁸⁷ The Supreme Court first acknowledged these constitutionally-recognized penumbras in *Griswold v. Connecticut*, in which it held that there is a zone of privacy rights that is implicitly protected as substantive due process under the Constitution.⁸⁸ These are rights that are considered implicit to the concept of ordered liberty, such as the right choice about family formation, childrearing, bodily integrity, procreation, and others. The right to parental decision making about one’s children is a key right that factors into the nationwide vaccination debate at the constitutional level.

Even prior to the conceptualization of “penumbras” as a constitutional law theory, the right to control the upbringing of one’s children was recognized by the United States Supreme Court as early as the beginning of the twentieth century.⁸⁹ States generally provide parents with discretion in decision making regarding the upbringing of their children.⁹⁰ The United States Supreme Court first recognized this right in *Meyer v. Nebraska*, a case in which the Court invalidated a Nebraska statute that made it illegal to teach students in any language other than

⁸⁶ U.S. Const. Amend. XIV.

⁸⁷ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁸⁸ *Id.*

⁸⁹ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

⁹⁰ See *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (recognizing parents’ rights to raise their children as they see fit without unnecessary interference by the State).

English.⁹¹ In reaching this decision, the Court assessed whether the statute unreasonably infringed the liberty guaranteed by the Fourteenth Amendment.⁹² The Court held that it did because parents' right to raise their children as they see fit is one that the State may not interfere with "under the guise of protecting the public interest."⁹³ The Court acknowledges that the State has an interest in passing the statute, namely to encourage immigrant children to learn English and assimilate to American culture, but holds that it infringes on a fundamental right in its attempt to address this concern because the Constitution applies to all, including those who speak English and those who do not.⁹⁴

The Court affirmed the holding in *Meyer* two years later in *Pierce v. Society of Sisters*, in which the Court opined, "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."⁹⁵ In doing so, the Court upheld *Meyer*'s principles and invalidated an Oregon law that required every child between ages eight and sixteen to attend public schools.⁹⁶ The Court reasoned that Constitutional notions of liberty forbid the State from intruding into the parent-child relationship and requiring children to accept instruction from public school teachers only.⁹⁷

⁹¹ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

⁹² *Id.* at 399.

⁹³ *Id.* at 400.

⁹⁴ *Id.* at 398.

⁹⁵ *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) at 535.

⁹⁶ *Id.*

⁹⁷ *Id.*

However this parental right is not absolute and the state may step between the parent-child relationship in certain circumstances.⁹⁸ The doctrine of *parens patriae* allows states to step in to protect children in such situations where parents are not acting in the best interests of the child.⁹⁹ The Court supported the notion that by acting to protect a child's wellbeing, the state as *parens patriae* may restrict parental control by requiring school attendance, regulating or prohibiting child labor, mandating compulsory vaccination, and in many other ways.¹⁰⁰ As is the case in many situations which involve personal liberty interests that compete with state interests, courts often weigh a number of considerations in assessing whether state intervention in the parent child relationship is an appropriate remedy.

Prince v. Massachusetts and its progeny weighed the competing interests of parents being able to make decisions regarding their children and the interests of the state in protecting the welfare of children as a whole. While the Court emphasized that families are given a lot of deference in decision making, it recognized that "the family itself is not beyond regulation in the public interest... and neither rights of religion nor rights of parenthood are beyond limitation."¹⁰¹ Since it was decided, *Prince* has been affirmed by a number of jurisdictions throughout the nation as standing for the proposition that state intervention in the parent child relationship is applicable in certain limited circumstances in which parents fail to recognize the best interest of the child or the state has a compelling interest to do so for protection of society as a whole.¹⁰²

⁹⁸ *Prince v. Massachusetts*, 321 U.S. 158 (1944) (holding that in the interest of the child's wellbeing the State may restrict parental control by requiring school attendance and regulating or prohibiting child labor).

⁹⁹ Rajan Bal, *The Perils of Parens Patriae*, Georgetown Law, November 21, 2017.

¹⁰⁰ *Id.*

¹⁰¹ *Prince v. Massachusetts*, 321 U.S. 158 (1944) at 166.

¹⁰² *Matter of Brittany T.*, 835 N.Y.S.2d 829 (2007) (holding that a minor's continued residency in her home is contrary to her health, welfare, and safety, warranting state intervention to remove her from her parents' custody); *Workman v. Mingo County Bd. of Educ.*, 419 Fed. Appx. 348.

Minors' Autonomy Interests Regarding Their Own Sexuality and Reproductive Health

One frequently cited reason by parents for failure to vaccinate against HPV, according to doctors who participated in a survey about vaccine implementation, is that HPV vaccination would encourage or support sexual activity among minors.¹⁰³ However, while this reason is cited as an argument against vaccination, it actually supports the notion that the state has an interest in treating this specific vaccine differently than others because it implicates children's personal interests pertaining to their privacy and reproductive health decisions.¹⁰⁴ In *Carey v. Populations Services International*, the Supreme Court recognized that the right to privacy in connection with decisions affecting procreation extends to minors, as well as adults.¹⁰⁵ The Court then went on to hold that states can allow minors access to abortion without a parental consent requirement despite recognizing that parents have an important role in their children's lives; upon weighing the liberty interests at stake, the Court found that children's liberty interests can potentially outweigh parents' fundamental right to make decisions about their children, so states should be able to statutorily acknowledge this concern.¹⁰⁶

(4th Cir. 2011) (holding that a state may constitutionally require parents to vaccinate school children because preventing the spread of communicable diseases is a compelling state interest); *In re Texas Dept. of Family and Protective Services*, 255 S.W.3d 613 (Tex. 2008) (holding that state intervention is appropriate in instances of child abuse and neglect); *Newmark v. Williams*, 588 A.2d 1108 (Del. 1991) (declining to allow state intervention where parents opted not to treat their child's aggressive form of cancer, but commenting that state intervention where parents fail to provide medical treatment may sometimes be appropriate depending on the best interest of the child standard).

¹⁰³ Anne Rositch, M.S.P.H., Ph.D., *The HPV Vaccine: Why Parents Really Choose to Refuse*, John Hopkins University School of Medicine, October 24, 2018.

¹⁰⁴ *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977) (recognizing that minors also have fundamental rights that the state has an interest in protecting).

¹⁰⁵ *Id.* at 693.

¹⁰⁶ *Bellotti v. Baird (II)*, 443 U.S. 622 (1979).

Most states have adopted statutes that allow minors to provide independent consent for certain specific types of treatment, such as testing and treatment for sexually transmitted infections, as a result of public policy concerns.¹⁰⁷ These exceptions to the general requirement for parental consent stem from the idea that minors will be less likely to seek treatment or testing if they are required to notify their parents and obtain consent in order to do so.¹⁰⁸ Many states apply the same considerations to other “sensitive” issues, such as drug and alcohol abuse treatment and mental health counseling services.¹⁰⁹ This in turn implicates the states’ *parens patriae* interests in ensuring welfare of minors because states have an interest in minors seeking treatment for health related issues.¹¹⁰ Additionally, failure to get treated for a sexually transmitted infection affects not only the minor who has the infection, but also puts other individuals at risk, so the state’s interest in giving children the ability to seek medical attention without being deterred by the parental consent requirement is very relevant to the analysis.¹¹¹

This same rationale should apply to HPV vaccination as well. Knowing that vaccination mandates as prerequisites for school attendance are the most effective means of ensuring compliance with vaccination, the state should use its police power to step in the parent child relationship regarding this issue and mandate HPV vaccinations in order for children to attend school.¹¹² While this involves the state stepping into the constitutionally protected family

¹⁰⁷ Rhonda Gay Hartman, J.D. Ph.D., *Adolescent Decisional Autonomy for Medical Care: Physician Perceptions and Practices*, Vol. 8, The University of Chicago Law School Roundtable, Article 5.

¹⁰⁸ *Id.* at 88.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 89.

¹¹¹ *Id.*

¹¹² Marnina Cherkin, *Three Shots in the Arm: The HPV Vaccine and Inclusive Health Policy*, 15 U. Pa. J. L. & Soc. Change 475, 476 (2012) (“State-mandated vaccinations for school attendance are the most effective means of vaccinating a population.”).

relationship, in light of the competing public health interests of discouraging the spread of preventable diseases in the community and the individual liberty interests of minors regarding decisions pertaining to their own sexuality and autonomy, intervention is fitting here. Many states treat parental decision making differently in the context of abortion and contraception than they do in the context of medical decisions precisely because of the unique intersection of liberty interests at play in this setting.¹¹³ The same rationale should be applied to HPV vaccination as well. State mandated HPV vaccination is further bolstered by the Supreme Court's holding in *Jacobson v. Massachusetts*.

Rational Basis Scrutiny and HPV Vaccine Requirement

Jacobson v. Massachusetts supported vaccine requirements as a possible route for states seeking to promote public health, while also subjecting vaccine requirements to a rational basis review.¹¹⁴ Despite concerns about constitutional overstep into the realm of parental childrearing, the Court has recognized limitations to parental authority, such as the need to protect society's public health as a whole or the protection of the competing liberty interests of the child himself.¹¹⁵¹¹⁶

Rational basis review is deferential to state legislatures and generally allows for the implementation of public health laws that a state reasonably believes are related to a state interest.¹¹⁷ Parents and media opposing the HPV vaccine frequently do so by questioning its

¹¹³ See *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing individuals' rights to decision making about their own health and bodies) and *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977) (recognizing that minors have fundamental personal privacy rights as adults do despite their age).

¹¹⁴ *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

¹¹⁵ *Id.*

¹¹⁶ See *Roe*; *Carey*; *Belloti*.

¹¹⁷ *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

constitutionality and pointing to the fact that HPV is sexually transmitted as compared to the airborne nature of transmission of most other mandatory vaccination diseases.¹¹⁸ However, the sexual transmission of HPV is irrelevant to the constitutional analysis of state HPV vaccine requirements. The efficacy of the vaccine in preventing HPV and the state's interest in promoting the vaccine are both relevant in assessing whether the state has the power to do so, but the sexual nature of the vaccine is not.¹¹⁹ In fact, states have mandated vaccines for other sexually transmitted diseases, such as Hepatitis B, and these requirements have been subjected to and passed rational basis constitutional muster.¹²⁰ Therefore, the same logic should extend to the HPV vaccine in light of the threat HPV poses to public health and states' interests in preventing its spread in the community.

Conclusion:

Although often asymptomatic entirely, HPV infection is a leading cause of the development of a number of fatal cancers over time.¹²¹ Furthermore, the fact that it shows little to no symptoms initially is one of the reasons that people fail to recognize that they have the infection, thus spreading it easily to other people through sexual contact.¹²² While HPV does not spread with the ease of airborne transmission that such infections as the measles or mumps do, it is undeniable that it raises a significant public health threat because it is the most common

¹¹⁸ Marnina Cherkin, *Three Shots in the Arm: The HPV Vaccine and Inclusive Health Policy*, 15 U. Pa. J. L. & Soc. Change 475, 476 (2012).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ HPV and Cancer, National Cancer Institute, (October 8, 2019), <https://www.cancer.gov/about-cancer/causes-prevention/risk/infectious-agents/hpv-and-cancer#what-is-hpv>.

¹²² *Id.*

sexually transmitted infection in the United States.¹²³ States have an interest in preventing the spread of HPV both for the benefit of the health of the individual as well as the protection of society as a whole considering the alarmingly high statistics of HPV infection among adults.¹²⁴

The Gardisal HPV vaccine is described as one of the first “cures” to cancer because it is very effective at preventing HPV transmission.¹²⁵ Many HPV attributable cancers are largely only caused by HPV.¹²⁶ Therefore, prevention of HPV effectively results in prevention of that type of cancer.¹²⁷ Among growing opposition to vaccine requirements in general throughout the United States, there is an even larger group of opposition against the HPV vaccine specifically.¹²⁸ Those parents who oppose it fear not only safety concerns of vaccines as a whole, but also feel either that it is not necessary at such an early age or that it will encourage sexual behavior in their children.¹²⁹¹³⁰

Amidst this backlash, states are hesitant to impose HPV vaccine mandates, with two of the four states who opted to enforce vaccine requirements doing so in a way that still provides parents with a lot of discretion in deciding whether to vaccinate their children or not.¹³¹

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Elissa Meites, MD, Peter G. Szilagyi, MD, Harrell W. Chesson, PhD, Elizabeth R. Unger, PhD, José R. Romero, MD, Lauri E. Markowitz, MD, *Human Papillomavirus Vaccination for Adults: Updated Recommendations of the Advisory Committee on Immunization Practices*, Center for Disease Control and Prevention (August 16, 2019).

¹²⁶ HPV and Cancer, National Cancer Institute, (October 8, 2019), <https://www.cancer.gov/about-cancer/causes-prevention/risk/infectious-agents/hpv-and-cancer#what-is-hpv>.

¹²⁷ *Id.*

¹²⁸ Rebecca E. Skov, *Examining Mandatory HPV Vaccinations in School-Aged Children*, 62 *Food & Drug L.J.* 805 (2007).

¹²⁹ Anne Rositch, M.S.P.H., Ph.D., *The HPV Vaccine: Why Parents Really Choose to Refuse*, John Hopkins University School of Medicine, October 24, 2018.

¹³⁰ *Id.*

¹³¹ HPV Vaccine: State Legislation and Statutes; National Conference of State Legislatures Report, 2018.

Providing parents with too much discretion has made these vaccine mandates practically ineffective in administering the HPV vaccine to children of those states.¹³²¹³³ In order to effectively increase HPV vaccination rates, states should use their police power authority recognized in *Jacobson* and enforce strict HPV vaccination laws that require documentation of HPV vaccine initiation as a prerequisite for entering the seventh grade.¹³⁴ Such mandates would be subject to rational basis review and would pass constitutional scrutiny because they would be reasonably related to the state's interest in promoting public health. Rhode Island or Hawaii's mandates are a good model approach because they do not have HPV vaccine specific opt out possibilities for parents to avoid vaccinating their children.

Even though parents have a constitutional right to raise their children as they see fit, this right is subject to limitations and states can intervene in certain situations, such as vaccine requirements, because this involves the greater public safety of the entire community—an interest that outweighs the parent's right. Additionally, the Supreme Court and state courts throughout the country have been inclined to intervene in the parent-child relationship in highly important, but more sensitive areas of upbringing, such as in the context of abortion, contraceptives, drug and alcohol treatment, and mental health treatment.¹³⁵ All of these considerations encourage a proactive state treatment of the HPV vaccine for the benefit of the overall public health and safety of society despite backlash from some parents.

¹³² D.C. Law 17-10: Human Papillomavirus Vaccination and Reporting Act of 2007.

¹³³ Va. Code. Ann. §32.1-46 (2007).

¹³⁴ *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

¹³⁵ Rhonda Gay Hartman, J.D. Ph.D., *Adolescent Decisional Autonomy for Medical Care: Physician Perceptions and Practices*, Vol. 5The University of Chicago Law School Roundtable, Article 5.