Does Federal Preemption Inoculate Us Against the Alarming Prospect of State Vaccine Bans?

LARS NOAH*

With growing resistance to vaccinations—premised, for instance, on misplaced fears of side effects or religious objections—it takes little effort to imagine that a state might act to prohibit some or all uses of a particular vaccine licensed by the federal government. Indeed, one year ago, legislators in a couple of states toyed with the idea of banning the primary vaccines against Covid-19, and, twenty years ago, half a dozen states effectively barred certain uses of one flu vaccine formulation. Although federal law should preempt at least some of these types of state restrictions, the Supremacy Clause of the U.S. Constitution provides only a limited safeguard against such extremism.

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* Chesterfield Smith Eminent Scholar and Professor of Law, University of Florida (UF); member, UF's Emerging Pathogens Institute; author, *Law and the Public's Health* (Carolina Acad. Press 2023), and *Law, Medicine, and Medical Technology* (Foundation Press 5th ed. 2022).

There is no vaccine against stupidity.†

INTRODUCTION

Opposition to vaccines has a long history.[1] Until quite recently, however, these views occupied the fringes of society. Individuals might, of course, decline immunizations for themselves or their children for any number of idiosyncratic reasons—ranging from misconceptions about their safety to qualms about their production or purposes—without elevating such objections into broad-based resistance endorsed by mainstream politicians.[2] That has now changed as conservative officials increasingly question long-accepted public health strategies designed to protect populations against infectious disease threats.[3]

State laws that bar local officials or private businesses from mandating certain vaccines represent one manifestation of this new political landscape.[4] When left entirely to personal choice, of course, individuals convinced of the value of vaccines would remain free to take advantage of such protection, even if the goal of achieving broader (herd) immunity became harder to attain as others declined.[5] Meanwhile, in

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† The renowned physicist Albert Einstein (1879–1955) routinely gets credit for making this quip, but, in the absence of any accompanying citation to chapter and verse, it may represent another misattribution. *See* Andrew Robinson, *Einstein Said That—Didn't He?*, 557 NATURE 30 (2018); *cf.* THE ULTIMATE QUOTABLE EINSTEIN (Alice Calaprice ed. 2011) (failing to include this quotation).

1. *See* Robert M. Wolfe & Lisa K. Sharp, *Anti-Vaccinationists Past and Present*, 325 BMJ 430, 431–32 (2002). *See generally* JONATHAN M. BERMAN, ANTI-VAXXERS: HOW TO CHALLENGE A MISINFORMED MOVEMENT (2020).

2. *See, e.g.*, Soumya Karlamangla, *Anti-Vaccine Parents Snubbed Where They Were Once Welcomed*, N.Y. TIMES, Oct. 3, 2022, at A12 (profiling the dramatic shift in attitudes that occurred in Marin County just north of San Francisco); *see also* Fallon v. Mercy Cath. Med. Ctr. Se. Pa., 877 F.3d 487, 493 n.26 (3d Cir. 2017) (noting that "Christian Scientists regularly qualify for exemptions from vaccination requirements").

3. *See* Anjali Huynh, *DeSantis Disputes C.D.C. Vaccine Advice*, N.Y. TIMES, Sept. 15, 2023, at A13; Patricia Mazzei, *Florida Takes Lead as G.O.P. Fights Masks and Vaccine Mandates*, N.Y. TIMES, Nov. 19, 2021, at A13 (cataloging the various efforts by Republican state lawmakers around the country to push back against both local and federal responses to the pandemic); Lauren Weber & Joel Achenbach, *Future Peril in Covid Recoil*, WASH. POST, Mar. 9, 2023, at A1 ("At least 30 states, nearly all led by Republican legislatures, have passed laws since 2020 that limit public health authority . . . ."); Leana S. Wen, Opinion, *How to Counter Vaccine Misinformation This Election Cycle*, WASH. POST, Mar. 27, 2024, at A19 ("Public health proponents are right to be dismayed about this apparent normalization of anti-vaccine sentiments . . . .").

4. *See* Lauren Weber, *Vaccine Foes Are Gaining Power*, WASH. POST, Dec. 26, 2023, at A1; *see also infra* note 24 (elaborating).

5. *See* Dina Nathanson, Note, *Herd Protection v. Vaccine Abstention: Potential Conflict Between School Vaccine Requirements and State Religious Freedom Restoration Acts*, 42 AM. J.L. & MED. 621, 623–26 (2016). *See generally* MARK NAVIN, VALUES AND VACCINE REFUSAL: HARD QUESTIONS IN ETHICS, EPISTEMOLOGY, AND HEALTH CARE (2016); PAUL A. OFFIT, DEADLY CHOICES: HOW THE ANTI-VACCINE MOVEMENT THREATENS US ALL (2011).

such a regime, those opposed to vaccination could take their chances even if that meant increasing the risk of transmission to others in the community ineligible for immunization or else underprotected given the often inescapable limitations of these prophylactic measures.

A far more pernicious threat has, however, now appeared on the scene. A handful of states have considered prohibiting the use of some vaccines, at least in certain groups, which would deprive residents desiring such protection of the choice to get vaccinated.[6] If such laws took hold, they would effectively enshrine the scientific misconceptions or religious objections held by a distinct but now politically empowered minority of the population.[7] This Essay asks whether federal law might stand in the way of initiatives of this sort.

I. EMERGING STATE THREATS TO VACCINE ACCESS

When first tackling the broader subject of state bans on pharmaceuticals approved by the U.S. Food and Drug Administration (FDA), I posed the following hypothetical: "[W]hat if a state such as Kansas decided to prohibit the use of Gardasil®—a vaccine approved by the FDA to prevent . . . human papillomavirus (HPV), which sometimes causes cervical cancer—out of fears that it might promote sexual promiscuity among teenagers?"[8] Although that has not happened so far, parents occasionally have objected to school requirements for student vaccination against hepatitis B on the grounds of not wanting to facilitate what they regarded as sinful behaviors.[9]

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6. For a vague parallel, consider the somewhat puzzling opposition of some conservative legislatures to a novel food production technology. *See* Catherine Rampell, Opinion, *Republican Opposition to Lab-Made Meat Is Baloney*, WASH. POST, Apr. 3, 2024, at A21 ("To be clear, this is not about a left-wing nanny state *forcing* the sale or consumption of lab-grown meats. It's about a conservative nanny state *prohibiting* the voluntary consumption and sale of these products . . . .").

7. *See* Michael Hiltzik, Opinion, *The Anti-Vax Crowd's Intimidation Tactics*, L.A. TIMES, Dec. 12, 2021, at A2; Jan Hoffman, *More Oppose Vaccine Rules for Schools, Study Finds*, N.Y. TIMES, Dec. 17, 2022, at A14 ("[A]fter the ferocious battles over Covid shots of the past two years, simmering resistance to general school vaccine mandates has grown significantly. Now, 35 percent of parents oppose requirements that children receive routine immunizations . . . ."); *see also* Lauren Weber, *Nonprofits Hit It Big with Claims About Covid*, WASH. POST, Feb. 24, 2024, at A1 (reporting spikes in donations to anti-vaccination advocacy groups).

8. Lars Noah, *State Affronts to Federal Primacy in the Licensure of Pharmaceutical Products*, 2016 MICH. ST. L. REV. 1, 47; *see also* Jane E. Brody, *A Different Vaccine Is Facing Resistance*, N.Y. TIMES, Dec. 14, 2021, at D7 (reporting that, fifteen years after FDA approval, "the HPV vaccine, which can prevent as many as 90 percent of six potentially lethal cancers, is meeting with rising resistance [now up to 64 percent] from parents who must give their approval before their adolescent children can receive it").

9. *See, e.g.*, Boone v. Boozman, 217 F. Supp. 2d 938, 945 (E.D. Ark. 2002) (accepting as sincere the plaintiff's view that the use of this vaccine "supports the devil in his effort to encourage [her adolescent daughter] to engage in unprotected sex and intravenous drug use"); *In re* LePage, 18 P.3d 1177, 1178 n.1 (Wyo. 2001) (same).

Other immunization requirements have prompted religious objections from parents over the fact that the vaccines came from aborted fetal tissue cell lines.[10] Separately, misplaced fears of side effects continue to trigger resistance to other childhood vaccines,[11] including a combination used against diphtheria, tetanus, and pertussis (DTP), whose association with a rare seizure disorder remains in doubt,[12] and another one for measles, mumps, and rubella (MMR), whose reported link to autism got thoroughly debunked.[13]

Twenty years ago, half a dozen (mostly blue) states enacted laws barring the use of any vaccines that contain thimerosal, though typically just in pregnant women and young children.[14] Although manufacturers had removed that ingredient from most formulations before these laws took effect, prompted by misplaced fears related to the mercury content of this common preservative,[15] multidose products such as the

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10. *See* Rob Stein, *Health Workers' Choice Debated; Proposals Back Right Not to Treat*, WASH. POST, Jan. 30, 2006, at A1 (discussing this objection to the varicella (chickenpox) vaccine); Sheryl Gay Stolberg, *Activists, Citing Religion, Aiming to Limit Child Vaccine Mandates*, N.Y. TIMES, Dec. 4, 2023, at A1. The rubella vaccine suffers from the same supposed taint.

11. *See* Steve P. Calandrillo, *Vanishing Vaccinations: Why Are So Many Americans Opting out of Vaccinating Their Children?*, 37 U. MICH. J.L. REFORM 353, 388–406, 438–39 (2004); *see also* Frank DeStefano et al., *Principal Controversies in Vaccine Safety in the United States*, 69 CLINICAL INFECTIOUS DISEASES 726, 726–30 (2019) (summarizing the evidence against the most commonly expressed concerns).

12. *See* Gardiner Harris, *Vaccine Cleared Again as Autism Culprit*, N.Y. TIMES, Aug. 26, 2011, at A19 ("In retrospect, the whole-cell pertussis vaccine may have played little role in the underlying illness in many of these children [with Dravet syndrome, a severe form of epilepsy,] other than to serve as its first trigger."); *see also* Michael J. Smith & Charles R. Woods, *On-Time Vaccine Receipt in the First Year Does Not Adversely Affect Neuropsychological Outcomes*, 125 PEDIATRICS 1134, 1140 (2010); Soumya Karlamangla, *Does the Pertussis Vaccine Work?; Protection Against Whooping Cough from a Booster Shot Wanes Quickly, Research Finds*, L.A. TIMES, Feb. 5, 2016, at B2 (reporting that the shift to an acellular version of the pertussis component sacrificed efficacy).

13. *See* Lars Noah, *Truth or Consequences?: Commercial Free Speech vs. Public Health Promotion (at the FDA)*, 21 HEALTH MATRIX 31, 90 (2011) (explaining that it "has been completely discredited"); *see also* Moises Velasquez-Manoff, *The Anti-Vaccine Movement's New Frontier*, N.Y. TIMES MAG., May 29, 2022, at 30 (profiling Andrew Wakefield's crusade against the MMR vaccine for supposedly causing autism, which led British officials to revoke his medical license).

14. *See* CAL. HEALTH & SAFETY CODE § 124172 (West 2023); DEL. CODE ANN. tit. 16, § 510 (West 2023); MO. ANN. STAT. § 191.235 (West 2022); N.Y. PUB. HEALTH LAW § 2112 (McKinney 2023); WASH. REV. CODE ANN. § 70A.230.120 (West 2022); *see also* 410 ILL. COMP. STAT. ANN. 51/5 (West 2022) (applicable to all groups of potential recipients).

15. *See, e.g.*, Paul A. Offit, *Thimerosal and Vaccines—A Cautionary Tale*, 357 NEW ENG. J. MED. 1278, 1279 (2007) (explaining that "the notion that thimerosal causes autism has now been disproved by several excellent epidemiologic studies"); David Brown, *Experts Find No Vaccine-Autism Link*, WASH. POST, May 19, 2004, at A2 (reporting that the Institute of Medicine had exonerated thimerosal); *see also* Coalition for Mercury-Free Drugs v. Sebelius, 671 F.3d 1275, 1280–83 (D.C. Cir. 2012) (agreeing that an advocacy group lacked standing to challenge the FDA's denial of their citizen petition seeking the suspension of further distribution of multiple-dose vials of certain vaccines containing thimerosal that might get

annual flu vaccine still used thimerosal.[16] When the worrisome H1N1 strain of influenza threatened to spread in 2009, these states temporarily lifted their restrictions, but their laws remain on the books.[17]

The Covid-19 pandemic triggered pitched battles over the use of rapidly developed vaccines. Some individuals objected to the fact that aborted fetal tissue played a role in their development or production and sought religious exemptions to mandates on this ground.[18] Other skeptics feared the novel mRNA strategy used by the first pair of options.[19] Does anything prevent legislators who happen to hold such misguided views from foisting them on others in their communities? The brazen antics in state capitals around the country over the last few years make clear that crazier things have happened.

Indeed, a handful of legislators in a couple of (deeply red) states took fears about the mRNA Covid-19 vaccines seriously. In early 2023, one state senator in North Dakota introduced proposed legislation that would prohibit any vaccines formulated in this manner.[20] A little more than a week later, a couple of lawmakers in Idaho

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used in children and pregnant women).

16. *See* Denise F. Lillvis et al., *Power and Persuasion in the Vaccine Debates: An Analysis of Political Efforts and Outcomes in the United States, 1998–2012*, 92 MILBANK Q. 475, 500–01 (2014).

17. *See* Charlotte Schubert, *Pandemic Blows Lid off Laws Limiting Mercury in Vaccines*, 16 NATURE MED. 9, 9 (2010) (reporting that "all six states temporarily lifted the restriction in response to the outbreak of pandemic swine flu and the shortage of H1N1 vaccine").

18. *See, e.g.*, Does 1–3 v. Mills, 142 S. Ct. 17, 18 (2021) (Gorsuch, J., dissenting from the denial of an emergency stay) ("The applicants explain that receiving [any of] the Covid-19 vaccines violates their faith because of what they view as an impermissible connection between the vaccines and the cell lines of aborted fetuses."); *cf.* Marie McCullough, *How Vaccine Became Tied to Abortion: A Fetal Cell Connection to the Johnson & Johnson Shot Has Some Favoring Pfizer or Moderna Instead*, PHILA. INQUIRER, Mar. 5, 2021, at A8 (noting a weaker connection for the mRNA versions).

19. *See* Joanna K. Sax, *COVID-19 Vaccine Hesitancy and (Mis)perception of Risk*, 48 AM. J.L. & MED. 54, 81–82, 89–90 (2022); Apoorva Mandavilli, *Could the Covid-19 Vaccines Have Caused Some People Harm?*, N.Y. TIMES, May 5, 2024, at A1 (discussing official skepticism about reported links to rare side effects); *see also* Child.'s Health Def. v. FDA, 573 F. Supp. 3d 1234, 1242–45 (E.D. Tenn. 2021) (rejecting for lack of standing military service members' objections to the agency's decision to approve Pfizer's mRNA Covid-19 vaccine Comirnaty®), *aff'd*, 2022 WL 2704554, at *3–5 (6th Cir. 2022). The mRNA platform has shown promise in efforts to develop vaccines against a number of other threats. *See* Ryan Cross, *In Its Next Act, Can Moderna Clone Success?: The Cambridge Company Is Poised to Make Strides in mRNA Vaccines for Diseases Ranging from Flu to HIV to Cancer. But Scientific and Economic Hurdles Make Success Far from Guaranteed*, BOS. GLOBE, May 8, 2022, at A1.

20. *See* Jack Dura, *Bill Would Ban COVID-19 Shots in North Dakota; Lawmakers Weighing More Vaccine Bills, Again*, BISMARCK TRIB. (N.D.), Feb. 8, 2023, at B1.

introduced a nearly identical bill.[21] Thankfully, neither proposal made it out of committee,[22] but the alarm bells had sounded.[23]

Although these proposals failed, and laws adopted in other states went no further than barring mandatory immunizations with the Covid-19 vaccines,[24] the episode demonstrated that something previously unthinkable had become remotely possible.[25] Indeed, anti-vaccination policies and rhetoric emanating from high-ranking officials in other states make the prospect of a prohibition on the use of a vaccine far too plausible.[26] Would preemption stand in the way of such extremism?

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21. *See* Thao Nguyen, *Idaho Bill Would Criminalize Giving mRNA Vaccines—the Tech Used in Popular COVID Vaccines*, USA TODAY (Feb. 22, 2023), https://www.usatoday.com/story/news/nation/2023/02/21/idaho-mrna-covid-19-vaccines/11316055002/ [https://perma.cc/YVC6-UP49]; *see also* Laura Guido, *Nichols Introduces New Version of mRNA Vaccine Ban*, IDAHO PRESS (Mar. 10, 2023), https://www.idahopress.com/news/local/nichols-introduces-new-version-of-mrna-vaccine-ban/article_715afcd2-bf65-11ed-bffb-8baa1d32bf06.html (reporting that the reintroduced bill, H.B. 307, simply removed language making the restriction potentially applicable to veterinary uses after agricultural interests had raised objections) [https://perma.cc/43GU-FV9R].

22. *See, e.g.*, Jack Dura, *North Dakota Senate Amends Bill Banning COVID-19 Shots into Vaccine Study*, BISMARCK TRIB. (N.D.), Feb. 10, 2023, at A1. Even that watered-down bill failed to pass the legislature. *See* Jack Dura, *North Dakota House Rejects Proposed Study of Vaccines*, BISMARCK TRIB. (N.D.), Apr. 5, 2023, at B1.

23. *See* Melissa Suran, *Physicians Say an Idaho House Bill That Would Criminalize Administering mRNA Vaccines Is an Attack on the Medical Profession—Even If It Doesn't Become Law*, 329 JAMA 1051 (2023); *see also* Nicole Karlis, *Idaho Lawmakers Want to Criminalize mRNA Vaccines. Here's What Happens If Their Bill Passes*, SALON (Feb. 23, 2023), https://www.salon.com/2023/02/23/idaho-lawmakers-want-to-criminalize-mrna-vaccines-heres-what-happens-if-their-bill-passes/ (noting parallels to state restrictions on the FDA-approved abortion drug mifepristone) [https://perma.cc/9H47-R9GW].

24. *See, e.g.*, FLA. STAT. ANN. § 381.00316 (2023) (barring businesses from demanding that customers provide documentation of vaccination); MONT. CODE ANN. § 49-2-312 (2023) (same); *see also* Govind Persad, *Considering Vaccination Status*, 74 HASTINGS L.J. 399, 406–08 (2023) (discussing these and other laws).

25. *See* E-mail from Brian Abramson, Founding Chair, Nat'l Vaccine Law Conf., to author (Feb. 22, 2024 4:30 PM) (on file with author) ("[S]tate efforts to ban certain vaccines or types of vaccines . . . would have been unthinkable half a decade ago, but seems inevitable now."); *see also* Joshua M. Sharfstein et al., Letter, *Uncoupling Vaccination from Politics: A Call to Action*, 398 LANCET 1211, 1211 (2021) ("Historically, anti-vaccine rhetoric has had minimal policy impact because bipartisan political leadership strongly endorsed the safety and effectiveness of vaccines. However, in recent years, anti-vaccine activism has received support from some state-level Republican officials . . . .").

26. For instance, the surgeon general of the Sunshine State (and my nominal cross-campus colleague) Joe Ladapo persists in this view. *See* Dan Diamond et al., *Fla. Surgeon General Seeks to Stop Use of mRNA Covid Vaccines*, WASH. POST, Jan. 4, 2024, at A2 (characterizing his latest objections as "roundly debunked" and irresponsible); *see also* Cindy Krischer Goodman, *DeSantis Will Not Declare Emergency—Declaration Could Help with Logistics. Coordination Between State, Local Concerns*, ORLANDO SENT., Aug. 4, 2022, at A3 (noting that Dr. Ladapo had questioned the efficacy of the FDA-approved vaccine against monkeypox); Patricia Mazzei, *New Florida Surgeon General Bolsters DeSantis's Policies*, N.Y. TIMES, Feb. 24, 2022, at A14 ("To scientists appalled by Florida's hands-off approach to the virus, Dr. Ladapo's ascent cemented their belief that public health had become entrenched

II. ASSESSING THE PREEMPTION DIMENSION

Federal law may oust state law under a variety of circumstances. Article VI of the U.S. Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[27] Unless Congress does so expressly when it legislates, courts may find that federal law on a subject impliedly preempts state law, either because the former entirely occupied a field or in the event of a conflict between federal and state law; the latter type of implied preemption may arise either by virtue of an impossibility of dual compliance or insofar as state law would stand as an obstacle to the accomplishment of purposes underlying federal law.[28]

The Supremacy Clause could erect a constitutional barrier to state efforts aimed at interfering with the distribution of FDA-approved products, and this question may soon confront courts in the context of medication abortion. As the license issued by the agency survived a judicial challenge that wound its way up to the U.S. Supreme Court,[29] judges will now have to decide whether federal permission to sell the drug mifepristone preempts state efforts to bar its continued use. Untangling that puzzle will require attention to "a subtle but potentially consequential distinction between interdicting supply of the drug and interdicting demand for it."[30]

In cases where Congress has expressed a broad preemptive intent, the line between supply-side and demand-side state interventions may not matter as much.[31]

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in the nation's polarized politics."); Lena H. Sun & Lauren Weber, *Florida Surgeon General Defies Experts Amid Measles Outbreak*, WASH. POST, Feb. 24, 2024, at A2 (reporting that, in response to a cluster of measles at an elementary school, he issued guidance declining to urge parents to vaccinate their children or keep any unvaccinated students home as a precaution).

27. U.S. CONST. art. VI, cl. 2.

28. *See, e.g.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372–73 (2000); *see also* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 227–29 (2000) (summarizing the U.S. Supreme Court's framework as a prelude to questioning the obstacle prong of implied conflict preemption).

29. *See* All. for Hippocratic Med. v. FDA, 78 F.4th 210, 256 (5th Cir. 2023) (modifying the district court's order issuing a preliminary stay of the license for mifepristone), *rev'd*, 602 U.S. 367 (2024) (holding unanimously that the plaintiffs lacked standing); *see also* Lars Noah, *Listening to Mifepristone*, 80 N.Y.U. ANN. SURV. AM. L. 33, 44–50 (2023) (discussing the early phases of this litigation).

30. Noah, *supra* note 29, at 42 n.31; *cf.* Lars Noah, *A Miscarriage in the Drug Approval Process?: Mifepristone Embroils the FDA in Abortion Politics*, 36 WAKE FOREST L. REV. 571, 601 (2001) (suggesting a more flexible analysis back when "obstacle" preemption remained in vogue). Efforts to interdict demand (e.g., imposing restrictions on use) may, of course, trigger Fourteenth Amendment objections premised on rights of access asserted by users, and the Court has recognized that efforts to interdict supply would burden any such rights in a comparable way. *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 687–88 (1977) ("A total prohibition against sale of contraceptives, for example, would intrude upon individual decisions in matters of procreation and contraception as harshly as a direct ban on their use. Indeed, . . . since more easily and less offensively enforced, [it] might have an even more devastating effect . . . .").

31. Consider this passage from the Supreme Court's nearly unanimous opinion of twenty

In cases where Congress neglected to express itself, however, this distinction may well become central to resolving questions about implied preemption. Thus, if a state law directly forbids the sale of mifepristone,[32] then the Supremacy Clause should give effect to the federal license. If, however, a state law greatly but not entirely restricted the drug's continued prescribing and dispensing by health care professionals, then the Supremacy Clause may not stand in the way.[33]

Unless a state restriction creates an actual conflict with federal permission to sell a drug, implied preemption probably becomes inapt. First, in spite of often comprehensive regulation of therapeutic products by the FDA, the U.S. Supreme Court has long rejected suggestions that implied preemption exists simply because this agency has entirely occupied the field.[34] Second, more than a decade has now passed since the Court appeared to move away from the obstacle (a.k.a. "frustration of purposes") prong of implied preemption in favor of an expanded version of the impossibility (of dual compliance) prong.

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years ago under the Clean Air Act: "[T]reating sales restrictions and purchase restrictions differently for pre-emption purposes would make no sense. The manufacturer's right to sell federally approved vehicles is meaningless in the absence of a purchaser's right to buy them." Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 255 (2004); *see also id.* ("It is true that the Fleet Rules at issue here cover only certain purchasers and certain federally certified vehicles, and thus do not eliminate all demand for covered vehicles. But if one State or political subdivision may enact such rules, then so may any other; and the end result would undo Congress's carefully calibrated regulatory scheme."); *cf.* Nat'l Meat Ass'n v. Harris, 565 U.S. 452, 463–64 (2012) (unanimously finding express preemption of a California law that had barred the retail sale of meat from nonambulatory pigs because it impermissibly impinged upon federally regulated (though upstream) slaughterhouse practices).

32. *See* David W. Chen & Pam Belluck, *Wyoming Becomes the First State to Outlaw Pills for Medical Abortion*, N.Y. TIMES, Mar. 18, 2023, at A18; *cf.* Emily Cochrane & Pam Belluck, *In Louisiana, a Vote to Make Abortion Pills Controlled Substances*, N.Y. TIMES, May 24, 2024, at A20 (reporting that another state's legislature moved it into Schedule IV).

33. *See* GenBioPro, Inc. v. Sorsaia, No. 3:23-0058, 2023 WL 5490179, at *7–10 (S.D. W. Va. Aug. 24, 2023) (dismissing claims by the generic drug manufacturer that FDA approval preempted state restrictions on abortion as applied to mifepristone). The fact that the FDA imposed special distribution controls on mifepristone, using the "Risk Evaluation and Mitigation Strategy" (REMS) authority granted by Congress in 2007, *see* 21 U.S.C. § 355-1(f), arguably strengthens the argument for implied preemption of more stringent state restrictions on the use of this particular drug. *See* Bryant v. Stein, No. 1:23-CV-77, 2024 WL 1886907 (M.D.N.C. Apr. 30, 2024) (holding that the mifepristone REMS preempted some of North Carolina's more onerous distribution restrictions).

34. *See* Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707, 718 (1985) ("Given the presumption that state and local regulation related to matters of health and safety can normally coexist with federal regulations, we will seldom infer, solely from the comprehensiveness of federal regulations, an intent to pre-empt in its entirety a field related to health and safety."); *see also* Wyeth v. Levine, 555 U.S. 555, 560 (2009) (noting that the defendant drug manufacturer had abandoned its field preemption argument after the trial judge found no merit to it); *cf.* Medtronic, Inc. v. Lohr, 518 U.S. 470, 503, 508 (1996) (Breyer, J., concurring in part and concurring in the judgment) (failing, like the lead opinion, to "find any indication that either Congress or the FDA intended the relevant [medical device] regulations to occupy entirely any relevant field").

In *Mutual Pharmaceutical Co. v. Bartlett*,[35] the plaintiff had suffered a devastating injury after using a prescription analgesic;[36] the jury returned a sizeable verdict on her design defect claim, but the Court reversed the judgment for the plaintiff as preempted.[37] The Court did not, however, view state tort law as impliedly preempted because it would stand as an obstacle to—or otherwise frustrate the purposes underlying—federal law; instead, the defendant would have found it impossible to comply with both federal and state law.[38] Indeed, the majority opinion did not even mention the obstacle prong in its summary of basic preemption doctrine.[39]

The *Bartlett* Court explained that the seller of an FDA-approved drug could not modify the composition of the product without seeking a new license from the agency.[40] The plaintiff argued that the defendant could have simply declined to market its product, but the majority regarded this option as plainly preempted.[41] The plaintiff also argued that the defendant could have continued marketing the drug with the understanding that it might have to pay damages for any injuries that occurred, but again the majority saw such an obligation as impermissibly flying in the face of the agency's approval decision.[42]

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35. 570 U.S. 472 (2013).

36. *See id.* at 478.

37. *See id.* at 479, 493.

38. *See id.* at 480–90.

39. *See id.* at 480; *see also* Murphy v. NCAA, 584 U.S. 453, 477–79 (2018) (same). Six years after *Bartlett*, Justice Gorsuch penned an opinion for three members of the Court in a non-tort (and non-FDA) case that also expressed doubts about the continued viability of obstacle preemption. *See* Va. Uranium, Inc. v. Warren, 587 U.S. 761, 778–79 (2019) (plurality opinion); *cf. id.* at 781 (Ginsburg, J., concurring) (Petitioner's "obstacle preemption arguments fail under existing doctrine, so there is little reason to question . . . whether that doctrine should be retained."). In contrast, just one year before *Bartlett*, the Court continued to take obstacle preemption seriously. *See* Arizona v. United States, 567 U.S. 387, 406, 410 (2012). The Court unanimously found obstacle preemption in several earlier cases. *See, e.g.*, United States v. Locke, 529 U.S. 89, 108–16 (2000) (invalidating the State of Washington's limits on oil tanker operation and personnel); Barnett Bank of Marion Cnty., N.A. v. Nelson, 517 U.S. 25, 31–38 (1996) (invalidating a Florida statute that prohibited national banks from selling insurance in small towns where a federal statute had authorized such conduct); California v. FERC, 495 U.S. 490, 506–07 (1990) ("[A]llowing California to impose the challenged [minimum stream flow] requirements would be contrary to congressional intent regarding the Commission's licensing authority and would constitute a veto of the [dam] project that was approved and licensed by FERC." (quotation marks omitted)). *See generally* Gregory M. Dickinson, *An Empirical Study of Obstacle Preemption in the Supreme Court*, 89 NEB. L. REV. 682 (2011).

40. *See Bartlett*, 570 U.S. at 477, 484; *see also id.* at 490 ("[S]tate-law design-defect claims like New Hampshire's that place a duty on manufacturers to render a drug safer by either altering its composition or altering its labeling are in conflict with federal laws that prohibit manufacturers from unilaterally altering drug composition or [at least in the case of generic versions] labeling.").

41. *See id.* at 488–89; *see also id.* at 475 ("[A]dopting the . . . stop-selling rationale would render impossibility pre-emption a dead letter and work a revolution in this Court's pre-emption case law.").

42. *See id.* at 487 n.3; *see also id.* at 491 ("[T]he distinction between common law and statutory law is irrelevant to the argument at hand: In violating a common-law duty, as surely

Four members of the Court dissented. They detected no actual conflict because the license holder remained free to either exit that state's market or absorb any "fines" levied through tort litigation.[43] Unlike the majority, however, the dissenters conceded that obstacle preemption might come into play in such circumstances even if not apt in this case.[44] In the end, of course, the arguments of the dissenting Justices—including a willingness to entertain obstacle preemption—lost out in this case, and their ranks have only dwindled further in the meantime.

Bartlett suggests that federal licensing of a drug would impliedly preempt state positive law as well.[45] Even the dissenting opinions seemed somewhat more open to the idea that state statutes might trigger impossibility preemption.[46] If the relatively more attenuated command of design defect scrutiny in tort law created an actual conflict with federal law governing FDA-approved drugs, then surely an outright sales prohibition imposed by state officials would do so as well.

Without obstacle preemption as an option to invalidate state statutes or rules, however, only showing an impossibility of dual compliance would oust restrictive state laws. An outright prohibition on the *sale* of an FDA-approved drug should fall victim to implied preemption, but a state prohibition on *use* becomes trickier because it would seem to require establishing that such a state law amounted to a *de facto* prohibition on the sale of a drug.[47]

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as by violating a statutory duty, a party contravenes the law."); *cf.* Merck Sharp & Dohme Corp. v. Albrecht, 587 U.S. 299, 314 (2019) (emphasizing, in reviewing a failure-to-warn claim involving an FDA-approved brand-name drug, that it does not suffice to demonstrate "impossibility where the laws of one sovereign permit an activity that the laws of the other sovereign restrict or even prohibit").

43. *See Bartlett*, 570 U.S. at 493 (Breyer, J., dissenting) (explaining that a "company can comply with both [state and federal law] either by not doing business in the relevant State or by paying the state penalty, say damages, for failing to comply with, as here, a state-law tort standard"); *id.* at 511 (Sotomayor, J., dissenting) ("[T]he manufacturer may still choose between exiting the market or continuing to sell while knowing it may have to pay compensation to consumers injured by its product.").

44. *See id.* at 493–94 (Breyer, J., dissenting); *id.* at 502, 514–15 (Sotomayor, J., dissenting); *cf. id.* at 512 ("Because the majority does not rely on obstacle pre-emption, it must believe that a manufacturer that received FDA premarket approval has a right . . . to keep its drug on the market unless and until the FDA revokes approval . . . .").

45. *See id.* at 489 n.5 (majority opinion) (suggesting that the imposition of tort liability is akin to a state "directly prohibiting the product's sale"); *id.* at 491 ("[S]tatutory 'mandate[s]' do precisely the same thing [as the threat of adverse tort judgments]: They require a manufacturer to choose between leaving the market and accepting the consequences of its actions (in the form of a fine or other sanction)."). Then again, to the extent that these decisions reflect the conservative wing's hostility toward tort law, perhaps those Justices would express greater sympathy for states' rights when positive law comes into conflict with FDA drug approval.

46. *See, e.g.*, *id.* at 502 (Sotomayor, J., dissenting) (hypothesizing such a conflict related to ingredient disclosure requirements even though a company could comply with both federal and state law by not selling in the state with the more restrictive approach); *id.* at 507 (contrasting the threat of liability with "a legal mandate . . . to take (or refrain from taking) a specific action"); *id.* at 511 n.8 (same).

47. *See* Lars Noah, *State Regulatory Responses to the Prescription Opioid Crisis: Too Much to Bear?*, 124 DICK. L. REV. 633, 643–45 (2020); *id.* at 648 ("[A] few states have capped

III. FOCUSING ON FEDERALLY LICENSED VACCINES

Outside of the common law arena, an effort to equate a limitation on use with a prohibition on the sale of a pharmaceutical product would require paying attention to the particulars of the federal license and the scope of the state's restriction. For example, the FDA has not approved certain vaccines for use in young children or pregnant women,[48] so state laws that barred only those uses (as had happened with some of the restrictions on thimerosal[49]) would in no sense pose any conflict with federal law. Conversely, the FDA has approved certain vaccines solely for use in children,[50] so state laws only prohibiting their use in minors would effectively render them unmarketable,[51] putting aside the slim chance that health care professionals might administer such products in adults as an "off-label" use.

As it happens, a stronger case exists for implied preemption in the context of vaccines as compared with other FDA-approved drug products. First, the Drug Amendments of 1962 included a savings clause that seemed to disavow obstacle preemption,[52] but an entirely different statute governs the licensing of vaccines.[53]

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maximum allowable dosages, which effectively prohibits the use of any opioids approved by the FDA for chronic pain patients if the individual dosage sizes exceed such a daily maximum." (footnote omitted)); *see also* Noah, *supra* note 8, at 13–15 (explaining that a federal district court took such an argument seriously insofar as a state law had so complicated physician efforts to use a particular drug that it effectively prohibited all use of it).

48. *See, e.g.*, Apoorva Mandavilli, *Errors Made in Who Got R.S.V. Vaccine*, N.Y. TIMES, Feb. 15, 2024, at A12.

49. *See supra* note 14.

50. *See, e.g.*, Lena H. Sun & Joel Achenbach, *Young Children Can Get Vaccine*, WASH. POST, June 19, 2022, at A1 (discussing formulations of the Covid-19 vaccines at fractions of the adult dose for children under five years of age). Initially, the CDC recommended broad use of the HPV vaccine Gardasil® solely in adolescents (first in girls, then in boys), only later extending that to certain adults. *See* David Brown, *HPV Vaccine Advised for Girls*, WASH. POST, June 30, 2006, at A5; *see also* Dani Blum, *On the HPV Vaccine and Cancer Prevention*, N.Y. TIMES, Feb. 27, 2024, at D7 ("The C.D.C. recommends the vaccine for all preteens from the age of 11 or 12 and anyone up to age 26. . . . The vaccine may still provide some benefit for people over age 26, and is approved up until age 45.").

51. *Cf.* Lori Rozsa, *Covid Vaccines for Kids Are Hard to Find in Fla.*, WASH. POST, July 18, 2022, at A1 (reporting that Ron DeSantis "was the only governor to refuse to preorder the vaccines, and to prohibit county health departments from distributing or administering the shots").

52. *See* Noah, *supra* note 8, at 8–9 ("In displacing state law only to the extent that 'a direct and positive conflict' exists, Congress expressed an intent that arguably forecloses implied preemption absent an impossibility of dual compliance—not because it can dictate how the federal courts apply the Supremacy Clause of the Constitution but by announcing a lack of any broader purpose to interfere with state authority."). The Public Health Service Act of 1944 included a similar clause, but it only related to regulations governing quarantine and the like. *See* 42 U.S.C. § 264(e).

53. A vaccine faces regulation as a "biological product," 42 U.S.C. § 262(i)(1), and it needs to secure approval of a biologic license application (BLA), *id.* § 262(a); *see also* 21 C.F.R. pts. 600–601 (2023). In 1962, the National Institutes of Health (NIH) still licensed vaccines, ceding that task to the FDA exactly one decade later. *See* Statement of Organization, Functions, and Delegations of Authority, 37 Fed. Reg. 12,865 (June 29, 1972).

Second, Congress has repeatedly expressed a principle of noninterference in the practice of medicine, thereby leaving states with the primary authority to regulate health care professionals,[54] but vaccines rarely involve any complex medical judgments much less necessitate physician involvement in their administration.[55]

Third, little doubt exists about the weightiness of federal purposes in this domain. The FDA's typical indifference when deciding whether or not to approve a new drug stands in contrast to the CDC's usual endorsement of newly licensed vaccines,[56] whose favorable recommendations for immunization enjoy tremendous clout.[57] Moreover, Congress has over the years expressed its support for widespread childhood immunization,[58] though the sole statutory preemption provision that focuses narrowly on vaccines only operates to displace certain tort claims against manufacturers.[59]

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54. *See* Lars Noah, *Ambivalent Commitments to Federalism in Controlling the Practice of Medicine*, 53 U. KAN. L. REV. 149, 155, 165–68, 173–74, 192 (2004); *see also id.* at 179 (noting "the FDA's professed lack of authority to control the uses to which physicians put therapeutic products that it has approved for marketing").

55. For this reason, courts have long recognized an exception to the "learned intermediary" doctrine in the case of mass immunizations. *See* Lars Noah, *Doctors on the Take: Aligning Tort Law to Address Drug Company Payments to Prescribers*, 66 BUFF. L. REV. 855, 889–90 (2018).

56. Noah, *supra* note 8, at 10.

57. *See* Lars Noah, *This Is Your Products Liability Restatement on Drugs*, 74 BROOK. L. REV. 839, 878 (2009) ("[A] vaccine licensed by the FDA but not yet blessed by the CDC might as well not exist."); Lena H. Sun & Fenit Nirappil, *U.S. Youths 12 to 15 Now Eligible for Pfizer Shot*, WASH. POST, May 13, 2021, at A1 (explaining the reasons for awaiting the CDC's endorsement of a new vaccine even after the FDA has granted authorization); *see also* Apoorva Mandavilli, *New Covid Shots Recommended for Americans 6 Months and Older This Fall*, N.Y. TIMES, June 28, 2024, at A18 (reporting that the agency already called for use of the next boosters when available).

58. *See* Lars Noah, *Triage in the Nation's Medicine Cabinet: The Puzzling Scarcity of Vaccines and Other Drugs*, 54 S.C. L. REV. 741, 761 (2003) (discussing the National Childhood Vaccine Injury Act (NCVIA), enacted in 1986 to stabilize the market by limiting the liability exposure of manufacturers); *id.* at 769 n.139 (noting that the NCVIA also "included provisions designed to promote vaccine innovation and production"); *id.* at 752 ("In 1993, Congress created the Childhood Immunization Initiative, which ensured free vaccines to all eligible children."); *id.* at 765 (explaining that, starting in 1982, Congress directed the CDC to stockpile childhood vaccines); *see also* 8 U.S.C. § 1182(a)(1)(A)(ii) (specifying health-related grounds for refusing the admission of an alien, including the "fail[ure] to present documentation of having received . . . vaccinations against vaccine-preventable diseases recommended by the [CDC's] Advisory Committee for Immunization Practices").

59. *See* Bruesewitz v. Wyeth LLC, 562 U.S. 223, 231–40, 243 (2011) (holding that the NCVIA expressly preempted design defect claims); *see also* Donald G. Gifford et al., *A Case Study in the Superiority of the Purposive Approach to Statutory Interpretation:* Bruesewitz v. Wyeth, 64 S.C. L. REV. 221, 241–42 (2012) (questioning the majority's conclusion that this statutory text operated as an "express" preemption provision). *See generally* Deborah F. Buckman, Annotation, *Construction and Application of Preemption Provisions of National Childhood Vaccine Injury Compensation Act of 1986 ("Vaccine Act")*, 39 A.L.R. FED. 2d 155 (2009 & 2023 Supp.).

In 2005, however, Congress enacted a more sweeping preemption clause that covers the use of pandemic countermeasures under certain circumstances.[60] Although it did so in connection with granting special immunities to suppliers and providers of medical products during a declared emergency,[61] this express preemption provision plainly reached beyond liability claims and also would displace direct state restrictions on covered immunizations.[62]

Because such an emergency declaration runs until the end of 2024,[63] federal law would have blocked Idaho's proposed ban on the mRNA Covid-19 vaccines at least initially.[64] In theory, the U.S. Department of Health and Human Services (HHS) could issue similar declarations in the future covering any states that chose to restrict the use of these or other types of vaccines,[65] at least if able to identify a plausible

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60. *See* Public Readiness and Emergency Preparedness (PREP) Act, Pub. L. No. 109-148, Div. C, § 2, 119 Stat. 2818, 2818–29 (2005) (codified at 42 U.S.C. § 247d-6d(b)(8)) (preempting any requirements made applicable to a countermeasure under the Food, Drug & Cosmetic Act (FDCA)).

61. *See* 42 U.S.C. § 247d-6d (authorizing the filing of a lawsuit generally only in the case of "willful misconduct"); *see also id.* § 247d-6d(c)(5) (providing that, in order to establish willful misconduct by a manufacturer or distributor, a plaintiff first would have to await successful government enforcement action for a violation of the FDCA).

62. *See* Preemption of State and Local Requirements Under a PREP Act Declaration, 2021 WL 298368, at *2 (O.L.C. Jan. 19, 2021) ("We conclude that the Act expressly preempts state and local requirements to the extent that they would effectively prohibit qualifying pharmacists from ordering and administering COVID-19 tests and vaccines authorized by the Secretary's declaration.").

63. *See* Eleventh Amendment to Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 88 Fed. Reg. 30,769 (May 12, 2023) (issuing likely the last in a series of PREP Act announcements); *see also id.* at 30,771 (§ V(d)) (conditioning coverage for pharmacists on adherence to CDC vaccination recommendations).

64. *See supra* notes 21–23 and accompanying text. Although the FDA had granted emergency use authorizations for a couple of non-mRNA Covid-19 vaccines at the time, it had fully approved only the mRNA versions. *See* Kathy Katella, *Comparing the COVID-19 Vaccines: How Are They Different?*, YALE MED. (Sept. 3, 2024), https://www.yalemedicine.org/news/covid-19-vaccine-comparison [https://perma.cc/9AJH-7EV7]; *see also* Lars Noah, *Eliding Consent in the Case of Pandemic Countermeasures Authorized Only for Emergency Use*, 58 IND. L. REV. (forthcoming Sept. 2024).

65. Another option, which has drawn attention as a potential end-run around growing state restrictions on abortion, would make use of certain federal lands (i.e., "enclaves") to offer locally prohibited medical services. *See* David S. Cohen et al., *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 80–87 (2023); *see also id.* at 87 (conceding that such a strategy would depend on "untested interpretations of federal law that raise thorny questions about the relationship between the federal government and the states"); Sheryl Gay Stolberg & Charlie Savage, *Biden Administration Wrestles with Options to Safeguard Access*, N.Y. TIMES, June 29, 2022, at A19 ("The administration has studied, but remains skeptical about, the idea of allowing abortion clinics on federal enclaves like military bases and national parks—where state prosecutors lack jurisdiction . . . ."). Thus, in any states that barred the use of certain vaccines, the CDC could try running periodic immunization drives on such sites, staffed entirely by federal employees.

threat of disease resurgence otherwise.[66] Securing preemption by this route assumes, however, that future administrations would not share the views prevailing in states that opted to impose such restrictions.[67]

In the absence of an HHS emergency declaration, only implied preemption might keep a state from limiting the availability of a particular vaccine. A complete prohibition on its sale (or use) would actually conflict with the federal decision to license the product, while only a partial restriction on use—e.g., in minors—seemingly would fail to do so.[68] In contrast to most other FDA-approved drugs, even partial restrictions on the use of a vaccine plainly would frustrate the purposes of Congress. Absent a judicial willingness to resurrect the obstacle prong of implied preemption, however, states thereby might manage to undermine federal efforts to promote widespread immunization.[69]

Preemption arguments to one side, substantive due process objections would help to reorient the constitutional issue by "shifting the focus from the rights asserted by sellers to the rights that users might invoke."[70] Claims of a fundamental right of

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66. *Cf.* LARS NOAH, LAW AND THE PUBLIC'S HEALTH: CASES, CONTROVERSIES, AND COVID-19, at 222 (2023) (explaining that "some vaccines have little to do with guarding against the spread of communicable diseases—a few protect against the development of health conditions after exposure to an infectious agent but hardly act to prevent its further transmission (e.g., tetanus, shingles, pneumococcal bacteria, and the rabies virus in humans)"); *id.* at 24 ("Some vaccines (e.g., tetanus antitoxin) deliver health benefits solely to the recipient and in circumstances without any prospect of wider circulation within a community . . . ."). Then again, even if HHS decided to issue a declaration for an infectious disease threat that lacked plausibility (or immediacy), it might not really matter because Congress expressly precluded judicial review. *See* 42 U.S.C. § 247d-6d(b)(7).

67. *See* Lauren Weber, *Trump's Record on Vaccines in Spotlight After RFK Jr.'s Backing*, WASH. POST, Aug. 31, 2024, at A4 ("[H]e is threatening to withhold money from schools with vaccine mandates."); *see also* Dan Diamond, *CDC Officials Recall Pressure, Threats from Trump Allies*, WASH. POST, Oct. 18, 2022, at A7.

68. *See* Lars Noah, *Preempting Red State Restrictions on the Use of Approved Drugs in Gender-Affirming Care?*, 2024 UTAH L. REV. 833, 847–48; *see also* Abbie VanSickle, *Justices to Hear Challenge to Law Banning Transgender Care for Minors*, N.Y. TIMES, June 25, 2024, at A19 ("The Supreme Court agreed on Monday to consider a Tennessee law that bans certain medical treatments for transgender minors, the first time the justices will decide on the constitutionality of such statewide bans. The move could have broad ramifications for about 25 states that have enacted similar measures.").

69. The U.S. Supreme Court recently seemed poised to address a similar question under the Emergency Medical Treatment and Active Labor Act (EMTALA), which specifies that it "do[es] not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section." 42 U.S.C. § 1395dd(f). A challenge to a state law banning abortions claimed that it impermissibly conflicts with EMTALA by providing too narrow of a maternal health exception. *See* Idaho v. United States, 623 F. Supp. 3d 1096, 1108–17 (D. Idaho 2022) (granting a preliminary injunction on grounds of implied preemption, finding a likelihood of success on both impossibility of dual compliance and frustration of federal purposes), *stay granted*, 83 F.4th 1130, 1135–40 (9th Cir.) (disagreeing with the district court's preemption analysis), *vacated for en banc rehearing*, 82 F.4th 1296 (9th Cir. 2023), *cert. dismissed as improvidently granted*, 144 S. Ct. 2015 (2024).

70. Noah, *supra* note 47, at 636. An effort to fashion an affirmative right of access, which

access to pharmaceutical products have, however, encountered judicial skepticism even when pressed by patients facing desperate straits.[71] Instead, contraceptives continue to represent the strongest case for asserting such a right.[72] Vaccines rarely get used for treatment,[73] of course, and they lack any connection to the recently diminished constitutional protections for reproductive autonomy,[74] but these medical technologies share with contraceptives the status of preventive measures chosen by otherwise healthy individuals.[75] Nonetheless, the Due Process Clause probably offers even less of a safe haven than does the Supremacy Clause.

CONCLUSION

Just as individuals must guard against becoming complacent about the risks of vaccine-preventable diseases, public health officials should not assume that federal endorsement necessarily guards against state proposals to interfere with continued access to vaccines. This Essay has laid out the various ways that preemption might come to the rescue without meaning to suggest that federal law invariably trumps more restrictive state laws in this area. Unless Congress decided to remove the need for a triggering declaration, HHS would need to remain vigilant to potential threats posed by state legislation and try to respond accordingly. Otherwise, courts would

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represents a difficult task in its own right, would confront the apparent lack of any flipside fundamental right to refuse vaccination. *See* NOAH, *supra* note 66, at 267 (Even if eventually abandoned as a precedent, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), "would still serve as evidence that any claimed (and more specifically defined) right to refuse vaccination plainly is not deeply rooted in our nation's history and traditions (as courts must determine whenever asked to recognize new fundamental rights)."). Claims of parental rights over medical care for their children would fare no better. *See id.* at 25 (discussing "dictum [in *Prince v. Massachusetts*, 321 U.S. 158 (1944),] that later proved to be influential among the lower courts").

71. *See* Noah, *supra* note 8, at 42–53 (struggling to craft such an argument); *see also* Noah, *supra* note 47, at 662 (If "the agency has issued a license but one state acts to disregard it, then persons in that state (and only that state) cannot take advantage of an [approved drug] even though it has received official sanction."); *id.* ("[U]pon FDA approval of a drug the baseline shifts from nonavailability to availability for . . . patients, which a particular state's restrictions then would unsettle in a way that interfered with their freedom to make potentially critical medical choices."); *id.* at 662–63 ("The act of federal licensure, even if not enough to trigger implied preemption under the Supremacy Clause, seems to make the state's burden of justification nearly impossible in the event that some form of heightened scrutiny applies.").

72. *See* Lars Noah, *Does the U.S. Constitution Constrain State Products Liability Doctrine?*, 92 TEMP. L. REV. 189, 216 (2019); *see also supra* note 30.

73. *See supra* note 66 (referencing, for instance, the rabies vaccine as an exception).

74. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 332 (2022) (Thomas, J., concurring) ("[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including [contraceptive access in] *Griswold* . . . .").

75. Barrier methods of contraception do double duty in avoiding both unwanted pregnancies and sexually transmitted infections, prompting some state actors in Idaho to draw an odd distinction. *See* Douglas Belkin & Laura Kusisto, *University of Idaho Curtails Contraception Options*, WALL ST. J., Sept. 30, 2022, at A3 ("The memo [from the university's general counsel] says condoms may be given out on campus to prevent sexually transmitted diseases but not as contraception . . . .").

have to decide whether to impliedly preempt any state efforts at limiting the availability of vaccines. Given the narrow scope of that doctrine as presently configured, however, only the most extreme restrictions on access would face the prospect of judicial invalidation.