

PROTECTING OUR CHILDREN:

The California Public School Vaccination Mandate Debate

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INTRODUCTION

In late December of 2014, a measles outbreak sickened 147 people in the United States.¹ Of those cases, 131 were in California.² Six of these measles cases were among infants who were too young to be vaccinated.³ Health officials suspected that this outbreak originated from an overseas visitor who spread the disease at Disneyland in Anaheim, California.⁴ While measles outbreaks are rare in the United States, outbreaks have occurred in U.S. communities with low vaccination rates.⁵ The Disneyland measles outbreak highlighted a small, but growing population of parents who refuse to vaccinate their children for religious or other personal reasons.⁶

While the United States does not have federal vaccination laws, each of the fifty states have laws mandating vaccination of children against diphtheria, tetanus, pertussis, polio, measles, and rubella as a condition of enrolling in public schools.⁷ However, there are exemptions to this rule.⁸ All states allow a medical exemption where vaccinations would complicate the health of the child; most states have a religious exemption; and nineteen states have a personal-belief exemption.⁹ California is one of nineteen states that allow all three of these exemptions [prior to enactment of SB 277 in June 2015].¹⁰

As children, and particularly those who are unvaccinated, are at higher risk of contracting and spreading diseases, public schools have become

¹ Alicia Chang, *Disney Measles Outbreak That Sparked Vaccination Debate Ends*, ASSOCIATED PRESS (Apr. 17, 2015, 4:44 PM), http://hosted2.ap.org/APDEFAULT/bbd825583c8542898e6fa7d440b9feb9c/Article_2015-04-17-US--Measles%20Outbreak-Things%20to%20Know/id-23d959cc52384abb72c1b7c9d320a1b.

² *Id.*

³ Christopher Ingraham, *California's Epidemic of Vaccine Denial, Mapped*, THE WASH. POST (Jan. 27, 2015), <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/01/27/californias-epidemic-of-vaccine-denial-mapped/>.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *State Vaccination Exemptions for Children Entering Public Schools*, PROCON.ORG, <http://vaccines.procon.org/view.resource.php?resourceID=003597> (last visited Mar. 8, 2015).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

the hotbed for the vaccination debate. Pro-vaccinators argue that children must be vaccinated in the absence of a medical issue in order to maintain herd immunity.¹¹ Herd immunity occurs when approximately 90 percent of a community is vaccinated and protected from disease.¹² The higher this percentage of immunization is, the less potential there is for an outbreak.¹³ This could be a matter of life or death in cases of children who cannot be vaccinated due to weak immune systems caused by chemotherapy or other health issues.¹⁴ On the other hand, anti-vaccinators who claim a personal-belief exemption cite the purported link between vaccinations and autism.¹⁵

Recently, the California Senate introduced SB 277, a bill that would eliminate California's religious and personal-belief exemptions from the mandate requiring vaccinations for students seeking to attend public school.¹⁶ The bill was recently passed by the California Senate and referred to the California Assembly Committee on Health for additional amendments.¹⁷ Anti-vaccinators, however, continue to oppose the bill, arguing that the bill forces their children to be homeschooled.¹⁸ They further contend that homeschooling is infeasible for single-parent and low-income families and would strip their children of their right to obtain a

¹¹ *Community Immunity* ("Herd Immunity"), VACCINES.GOV, <http://www.vaccines.gov/basics/protection/> (last visited Apr. 18, 2015).

¹² Emily Willingham & Laura Helft, *What is Herd Immunity*, KVIE, <http://www.pbs.org/wgbh/nova/body/herd-immunity.html> (last visited Mar. 8, 2015).

¹³ *Id.*

¹⁴ Lisa Aliferis, *To Protect His Son, A Father Asks School to Bar Unvaccinated Children*, NPR (Jan. 27, 2015, 5:05 PM), <http://www.npr.org/blogs/health/2015/01/27/381888697/to-protect-his-son-a-father-asks-school-to-bar-unvaccinated-children>.

¹⁵ Steven Salzberg, *Anti-Vaccine Movement Causes the Worst Whooping Cough Epidemic in 70 Years*, FORBES (July 23, 2012, 6:00 AM), <http://www.forbes.com/sites/stevensalzberg/2012/07/23/anti-vaccine-movement-causes-the-worst-whooping-cough-epidemic-in-70-years/>.

¹⁶ A Senate Bill Removing Religious and Personal Belief Exemptions from Vaccination Mandates, S.B. 277, 2015 Sess. (C.A. 2015), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB277 [hereinafter SB 277 Bill Text].

¹⁷ *Id.*

¹⁸ Tracy Seipel, *Vaccine Exemption: California SB 277 Opponents Vow to Pull Kids from School if Bill Passes*, SAN JOSE MERCURY NEWS (Apr. 13, 2015, 6:24 PM), http://www.mercurynews.com/health/ci_27907241/vaccine-exemption-california-sb-277-opponents-vow-pull.

public school education.¹⁹ The fundamental issue underlying this debate is whether one student's right to an education trumps another student's right to stay healthy.²⁰

This paper argues that SB 277 is constitutional. Part I provides background to the debate on balancing health and education in California public schools. Part II discusses foundational case law and statutes on vaccination. Part III analyzes the constitutional complexities that SB 277 brings to the debate. Part IV addresses concerns of inability to access vaccinations and adjustments to the terms of SB 277 with future biomedical advances. Part V is a summary and conclusion.

I. BACKGROUND: THE ANTI-VACCINATION DEBATE

This section provides a general background to the vaccination debate. It first discusses the idea of “herd immunity” and why low vaccination rates in public schools are of concern. It then tracks the increasing level of unvaccinated children in California and what contributed to the recent trend of unvaccinated children. Finally, this section discusses the demographics of anti-vaccinators in California.

A. HERD IMMUNITY

Pro-vaccinators emphasize the importance of immunization because of the idea of community immunity, or “herd immunity.”²¹ Herd immunity is critical to a community's health because it prevents the potential for outbreak and infection of individuals who are particularly vulnerable to disease.²² These persons include infants, pregnant women, or immunocompromised individuals.²³ While the threshold vaccination percentage for herd immunity is dependent on the disease, most diseases meet

¹⁹ Dave Marquis, *Bill Requiring Student Vaccinations Headed to Committee, Again*, News 10 ABC (Apr. 22, 2015, 10:48 AM), <http://www.news10.net/story/news/local/california/2015/04/22/vaccine-bill-immunize-home-school-amendments-vaccinate/26167515/>.

²⁰ *Id.*

²¹ *Community Immunity*, *supra* note 11.

²² *Id.*

²³ *Id.*

the minimum threshold at around 85 percent, but can range up to 94 percent.²⁴

B. THE INCREASE OF ANTI-VACCINATORS IN CALIFORNIA

The anti-vaccination movement has existed for over one hundred years in the United States.²⁵ The theories that existed a century ago regarding the perils of vaccination tend to parallel the arguments for anti-vaccination today. In 1898, a pamphlet claimed that vaccination “increases disease and mortality, and is believed to be the most likely cause of the increase of consumption and cancer, and probably many other forms of disease.”²⁶ A *Washington Post* article notes that anti-vaccination ideas included fear of cancer caused by impurities in the blood from vaccines and the belief that alternative medicine is a more effective option than vaccines.²⁷ Many of these anti-vaccination pamphlets appealed to mothers worried about what chemicals their children were exposed to.²⁸

Despite the long history of anti-vaccination in the United States, vaccination exemptions of children in public and private schools have doubled in just the last eight years.²⁹ In 2000, 0.77 percent of California kindergarteners had personal-belief exemptions.³⁰ This number quadrupled to 3.15 percent by 2013.³¹ This pattern is attributed to a 1998 study by Dr. Andrew Wakefield. A well-respected British medical journal, *The Lancet*, published Dr. Wakefield’s research, which linked measles, mumps, and

²⁴ Willingham & Helft, *supra* note 12.

²⁵ Abby Ohlheiser, *Meet the Crunchy, Chemical-Hating Anti-Vaccine Conspiracy Theorists. From 100 Years Ago*, THE WASH. POST (Feb. 5, 2015), <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/02/05/meet-the-crunchy-chemical-hating-anti-vaccine-conspiracy-theorists-from-100-years-ago/>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Michael Hiltzik, *Rich, Educated and Stupid Parents are Driving the Vaccination Crisis*, L.A. TIMES (Sept. 3, 2014, 1:18 PM), <http://www.latimes.com/business/hiltzik/la-fi-mh-vaccination-crisis-20140903-column.html>.

³⁰ Ingraham, *supra* note 3.

³¹ *Id.*

rubella vaccines to autism in children.³² The study was widely reported, especially to parents with autistic children.³³ While Dr. Wakefield's study was retracted because no doctors could replicate the study and no other research has linked vaccines to autism, the anti-vaccination movement has continued.³⁴

There are various factors that have contributed to the continuing vaccination scare. In the early 2000s, politicians in England and the United States sparked the modern vaccination debate.³⁵ However, the recent spread of the anti-vaccination scare was due to the media.³⁶ Prominent print and online magazines as well as veteran journalists printed various anti-vaccination articles which spread across the nation.³⁷ In 2011, the anti-vaccination debate found a staunch advocate in actress Jenny McCarthy.³⁸ Since then, various media personalities and shows have weighed in on the vaccination debate.³⁹ Although the Institute of Medicine and the Centers for Disease Control and Prevention released reports that disputed the link between vaccines and various developmental disorders, the U.S. media largely ignored this information.⁴⁰

C. DEMOGRAPHICS OF ANTI-VACCINATORS IN CALIFORNIA

The *Los Angeles Times* reports that higher rates of personal-belief exemptions are correlated with high median incomes.⁴¹ One study finds that in Los Angeles County, there are more than 150 schools "with exemption rates of 8 percent or higher for at least one vaccine [which] were located in census tracts where the incomes averaged \$94,500 — nearly 60 percent

³² Brian Krans, *Anti-Vaccination Movement Causes a Deadly Year in the U.S.*, HEALTHLINE (Dec. 3, 2013), <http://www.healthline.com/health-news/children-anti-vaccination-movement-leads-to-disease-outbreaks-120312>.

³³ *Id.*

³⁴ *Id.*

³⁵ Curtis Brainard, *Sticking with the Truth*, COLUMBIA JOURNALISM REVIEW (May/June 2013), http://www.cjr.org/feature/sticking_with_the_truth.php.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Hiltzik, *supra* note 29.

higher than the county median.” Another study reports that rich charter schools have the highest exemption rates.⁴²

Although, as stated earlier in Part IA, most diseases meet the threshold vaccination percentage for herd immunity at around 85 percent, an 8 percent exemption seriously threatens this immunity and causes the community to be prone to an outbreak.⁴³ Another article demonstrates how, in the last thirteen years, vaccination exemptions have tended to increase in wealthy coastal California cities.⁴⁴ In certain school districts in California, these rates are even higher.⁴⁵ Ocean Grove Charter School in Boulder Creek reports a 51 percent personal-belief exemption.⁴⁶ Certain private schools report a 75 percent or higher personal-belief exemption rate.⁴⁷ In the Montecito Union School District in Santa Barbara, which reports a 27.5 percent exemption rate, the median income is nearly \$103,000.⁴⁸

One question is why higher-income families tend to avoid vaccination. One article reports that parents who avoid vaccination tend to have less trust in governmental authorities.⁴⁹ Anti-vaccinators also tended to have a wider social network, comprising books, blogs, websites, and magazines, which they utilized for information on vaccination, and to rely on trends.⁵⁰ Nina Shapiro, a professor at the UCLA School of Medicine, writes that this trend falls into the “whole natural, BPA-free, hybrid car community that says ‘we’re not going to put chemicals in our children.’”⁵¹ Seth Mnookin, a journalist and author writing on the anti-vaccination

⁴² Philip N. Cohen, *Charter, Private, and Wealthy Schools Lead California Vaccine Exemptions*, FAMILY INEQUALITY (Feb. 4, 2015, 7:00 AM), <https://familyinequality.wordpress.com/2015/02/04/more-on-california-vaccine-exemptions/>.

⁴³ Hiltzik, *supra* note 29.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Hiltzik, *supra* note 29.

⁴⁹ Whet Moser, *Why Do Affluent, Well-Educated People Refuse Vaccines?*, CHICAGO MAG. (Mar. 26, 2014), <http://www.chicagomag.com/city-life/March-2014/Why-Is-Vaccine-Refusal-More-Prevalent-Among-the-Affluent/>.

⁵⁰ *Id.*

⁵¹ Alex Seitz-Wald, *What’s With Rich People Hating Vaccines?*, SALON (Aug. 14, 2013, 4:45 AM), http://www.salon.com/2013/08/14/whats_with_rich_people_hating_vaccines/.

movement, reaffirmed this sentiment, noting that families with a higher income could afford the expensive consequence of avoiding vaccination, and “tended to be self-satisfied, found it difficult to conceive of a world in which their voices were not heard, and took pride in being intellectually curious, thoughtful, and rational.”⁵²

II. THE UNITED STATES AND CALIFORNIA VACCINATION MANDATES

This section discusses foundational vaccination cases that paved the way for the current debate over vaccinations for children in California public schools. *Jacobson v. Massachusetts*⁵³ introduces the law behind mandating vaccination, while *Abeel v. Clark*⁵⁴ and *Zucht v. King*⁵⁵ discuss the constitutionality of mandating vaccines for students entering public school in California. *Prince v. Massachusetts*⁵⁶ discusses why parental rights do not trump the preservation of community health and safety. *Wong Wai v. Williamson*⁵⁷ clarifies exactly when a vaccination mandate may be applied in an unconstitutional, discriminatory manner; this will provide a standard in determining whether SB 277 unfairly targets a certain class of individuals in California. *Williams v. State* is a settled California case that discusses public schools’ duty to maintain the health of its students.⁵⁸ Finally, the next few sections introduce specific California statutes mandating vaccination — and amendments to the statutes in order to address a growing number of unvaccinated children — and explore instances in which excluding unvaccinated children may be warranted.

⁵² Moser, *supra* note 49.

⁵³ 197 U.S. 11 (1905).

⁵⁴ 84 Cal. 226 (1890).

⁵⁵ 260 U.S. 174 (1922).

⁵⁶ 321 U.S. 158 (1944).

⁵⁷ 103 F. 1 (N.D. Cal. 1900).

⁵⁸ *Notice of Class Action Settlement in the Williams v. State of California Education Lawsuit*, CAL. DEPT. OF EDUC., <http://www.cde.ca.gov/eo/ce/wc/noticeenglish.asp> (last visited Apr. 3, 2015) [hereinafter *Williams v. State of California Settlement Notice*].

A. *JACOBSON v. MASSACHUSETTS*: THE BROAD VACCINATION MANDATE

*Jacobson v. Massachusetts*⁵⁹ was a 1905 United States Supreme Court case that upheld the right of the states to enforce compulsory-vaccination laws. In *Jacobson*, the court addressed a 1902 regulation that mandated vaccination against smallpox, which was a prevalent disease and growing threat in the city of Cambridge during the early 1900s.⁶⁰ While a medical exemption for children existed, Massachusetts maintained that individuals over the age of 21 were required to receive vaccinations or pay a fine of five dollars.⁶¹ Henning Jacobson refused to be vaccinated, claiming that a vaccine had made him seriously ill as a child.⁶² He was charged with criminally failing to be vaccinated despite being over the age of 21 and having access to free vaccinations.⁶³

Jacobson broadly argued that the Massachusetts law requiring vaccination violated the “spirit” of the United States Constitution and cited the state’s duty to uphold the Constitution through the Fourteenth Amendment.⁶⁴ He further argued that the law invaded his liberty when the state subjected him to a fine or imprisonment as a result of his choice to refuse vaccination.⁶⁵ He noted that it was “hostile to the inherent right of every freeman to care for his own body and health in such a way as to him seems best” and argued that such penalties would be “an assault upon his person.”⁶⁶ The Supreme Court disregarded the Fourteenth Amendment argument, noting that it was not the source of any substantive power of the U.S. government.⁶⁷ Holding that the state had the authority to enact this statute under its police power, the Court discussed the validity of a compulsory-vaccination mandate.⁶⁸

⁵⁹ 197 U.S. 11 (1905).

⁶⁰ *Jacobson v. Massachusetts*, 197 U.S. 11, 12–13 (1905).

⁶¹ *Id.* at 12.

⁶² *Id.* at 37.

⁶³ *Id.* at 13.

⁶⁴ *Id.*

⁶⁵ *Id.* at 26.

⁶⁶ *Id.*

⁶⁷ *Id.* at 13, 26.

⁶⁸ *Id.* at 26.

The Court concluded that individual constitutional rights may be reasonably constrained for the common good.⁶⁹ Specifically, the Court reasoned that real liberty in an organized society can only exist when weighed against the injury that may be inflicted on others as a consequence of individual action.⁷⁰ The Court acknowledged that the common good is facilitated by the legislature, which exercises the police power of the states.⁷¹ Importantly, the Court noted that the opinion of a minority of individuals who believe in the harmful effects of vaccinations was trumped by the “common belief” of the majority of people and medical professionals who accept vaccinations as an effective method of preventing disease.⁷² The Court further reasoned that a “common belief, like common knowledge, does not require evidence to establish its existence,” and that the legislature and judiciary may act on this common belief without proof.⁷³ Thus, weight is given to common belief despite the possibility that it may be invalidated in the future.⁷⁴

In this case, the Court noted that the state took reasonable and appropriate measures when mandating adult vaccination.⁷⁵ The state required vaccination during an emergency called by the board of health, which was composed of persons who would be fit to determine this need.⁷⁶ The Court determined that while blanket, compulsory vaccination is unconstitutional, a mandate with medical exemptions that results in a fine or imprisonment for refusing to vaccinate is valid.⁷⁷

B. *ABEEL v. CLARK*: THE PUBLIC SCHOOL VACCINATION MANDATE IN CALIFORNIA

*Abeel v. Clark*⁷⁸ was an 1890 California Supreme Court case that affirmed that children could be denied admission to public schools for failing to

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 34–35.

⁷³ *Id.* at 35.

⁷⁴ *Id.*

⁷⁵ *Id.* at 27.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ 84 Cal. 226 (1890).

obtain necessary vaccinations. At the time of this case, a ‘Vaccination Act’ mandated the vaccination of all children seeking admission into school, unless the child obtained a medical exemption from a licensed physician.⁷⁹ James Abeel, the student seeking admission, argued that this act was unconstitutional because: (1) the subject of the act was not expressed in the title, and (2) the act was special, not general, in its scope.⁸⁰

The first argument refers to what is now California Constitution article IV, section 9.⁸¹ The purpose of this provision is to prevent legislators and the public from being misled by the title of legislation.⁸² The Court quickly dismissed this argument, noting that ‘Vaccination Act’ is a reasonable title for a mandate that requires vaccination.⁸³ The second argument was that the act is discriminatory because it impacts a certain class of individuals.⁸⁴ The Court reasoned that the class of students who attend public schools in the state is general in its scope.⁸⁵ The act does not need to include all classes of individuals in the state to be considered nondiscriminatory.⁸⁶ *Abeel* confirms that a broad vaccination mandate for public school children is valid, but discriminatory application of such a mandate would be unconstitutional.⁸⁷

In the 1922 case of *Zucht v. King*,⁸⁸ the U.S. Supreme Court ratified the holding in *Abeel*, holding that children who failed to obtain vaccinations and did not have a valid exemption could constitutionally be excluded from public and private schools.⁸⁹ Furthermore, the Court noted that this exclusion was valid even when there was “no [particular] occasion for requiring vaccination,” because the board of health had full, constitutional discretion to determine when vaccinations were mandatory for school children.⁹⁰

⁷⁹ *Abeel v. Clark*, 84 Cal. 226, 227–28 (1890).

⁸⁰ *Id.* at 228.

⁸¹ *Id.* at 228; CA. CONST. art. 4, § 9.

⁸² *Clark*, 84 Cal. at 228.

⁸³ *Id.* at 229.

⁸⁴ *Id.*

⁸⁵ *Id.* at 229–30.

⁸⁶ *Id.* at 230.

⁸⁷ *Id.*

⁸⁸ 260 U.S. 174 (1922).

⁸⁹ *Zucht v. King*, 260 U.S. 174, 177 (1922).

⁹⁰ *Id.* at 175.

C. *PRINCE v. MASSACHUSETTS*: PARENTAL RIGHTS

This 1944 U.S. Supreme Court case addressed the issue of when parental rights in caring for their children conflicts with another government interest.⁹¹ In *Prince v. Massachusetts*, Sarah Prince was convicted for violating Massachusetts' child-labor laws, which mandated that no boy under twelve and no girl under eighteen be allowed to sell or offer for sale merchandise in any street or public place.⁹² Prince allowed her two sons to engage in preaching activities, which consisted of selling copies of Jehovah's Witness religious material.⁹³

In upholding Prince's conviction, the Court looked at the balance between Prince's rights and the legitimate exercise of the state's police power over individual behavior.⁹⁴ Prince's interests included "freedom of conscience and religious practice," which is connected with her authority over her household and the "rearing of her children."⁹⁵ On the other hand, these rights conflict with the state's interest in protecting the welfare of children.⁹⁶ Here, Prince's right to exercise her religion and to raise her children in her preferred manner conflicted with the state's interest in protecting children from being exploited for labor.⁹⁷ The Court concluded that family and parental rights are subject to regulation in order to maintain this public interest of protecting children from exploitation.⁹⁸

The Court provided further instances where this principle may come into effect.⁹⁹ The Court noted that the state may restrict a parent's control by requiring children to attend school, by regulating child labor, and by mandating vaccination over religious objections.¹⁰⁰ In regard to vaccination, the Court argued that the "right to practice religion freely does not include liberty to expose the community or the child to communicable

⁹¹ *Prince v. Massachusetts*, 321 U.S. 158, 159 (1944).

⁹² *Id.* at 159–60.

⁹³ *Id.* at 161–62.

⁹⁴ *Id.* at 165.

⁹⁵ *Id.*

⁹⁶ *Id.* at 165–66.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 166.

¹⁰⁰ *Id.*

disease or the latter to ill health or death.”¹⁰¹ The Court placed higher restrictions on children’s activities because the United States relies on a “healthy, well-rounded growth of young people into full maturity as citizens, with all that implies.”¹⁰² While adults may choose specific actions that may harm themselves or make them “martyrs,” they do not have the authority to subject their children to potentially harmful behavior “before they have reached the age of full and legal discretion when they can make that choice for themselves.”¹⁰³

D. *WONG WAI v. WILLIAMSON*: UNNECESSARY VACCINATION RESTRICTIONS

However, it is possible for a vaccination mandate to be invalid even when the government claims it is meant to protect the health and safety of the community. In *Wong Wai v. Williamson*,¹⁰⁴ a federal circuit-court injunction in San Francisco was overturned. This injunction required all Chinese residents in San Francisco to receive a dangerous vaccination for the bubonic plague as a requirement to leaving the city.¹⁰⁵ In overturning the injunction, the Supreme Court noted that this vaccination was not implemented to protect the community against the bubonic plague, but instead was “boldly directed against the Asiatic or Mongolian race as a class, without regard to the previous condition, habits, exposure to disease, or residence of the individual.”¹⁰⁶ The Court further reasoned that the suggestion that a particular race was more susceptible to the plague than another was not sufficient justification for implementing such a mandate.¹⁰⁷

E. *WILLIAMS v. STATE*: SCHOOLS HAVE THE DUTY TO MAINTAIN HEALTH STANDARDS

Williams v. State was a 2004 class-action lawsuit brought against the State of California, the California Department of Education, California

¹⁰¹ *Id.* at 166–67.

¹⁰² *Id.* at 168.

¹⁰³ *Id.* at 170.

¹⁰⁴ 103 F. 1 (N.D. Cal. 1900).

¹⁰⁵ *Wong Wai v. Williamson*, 103 F. 1, 3 (N.D. Cal. 1900).

¹⁰⁶ *Id.* at 7.

¹⁰⁷ *Id.*

Board of Education, and California Superintendent of Public Instruction, alleging that students were attending substandard schools.¹⁰⁸ One of the deprivations that the lawsuit defined was an “inadequate, unsafe, and unhealthful” school facility where the students were subject to unsafe temperatures and unsanitary conditions that would subject them to disease.¹⁰⁹ While this lawsuit was ultimately settled, the state’s reluctance to contest the merits of the lawsuit suggests that California schools may have the duty to preserve a healthy environment for their students.¹¹⁰

F. CAL. HEALTH AND SAFETY CODE SECTION 120325 ET SEQ.

California also mandates immunization for children entering public and private schools in its Health and Safety Code.¹¹¹ Section 120335 requires both public and private school districts (including those that govern childcare centers, day nurseries, nursery schools, family-care homes, or development centers) not to admit students who have not been fully immunized.¹¹² The section specifically mandates immunizations against the following diseases: diphtheria, haemophilus influenza type B, measles, mumps, pertussis (whooping cough), poliomyelitis, rubella, tetanus, hepatitis B, and chickenpox.¹¹³ It further states that students need not be fully immunized against hepatitis B to advance to the seventh grade, but must be immunized against whooping cough to do so.¹¹⁴ The Health and Safety Code also provides exemptions from this mandate.¹¹⁵ Section 120365 provides a religious and personal-belief exemption. Section 120370 provides a medical exemption.¹¹⁶

¹⁰⁸ Williams v. State of California *Settlement Notice*, *supra* note 58.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ CAL. HEALTH & SAFETY CODE § 120325 et seq. (West 2015).

¹¹² HEALTH & SAFETY § 120335.

¹¹³ *Id.*

¹¹⁴ HEALTH & SAFETY §§ 120365, 120370.

¹¹⁵ HEALTH & SAFETY § 120365.

¹¹⁶ HEALTH & SAFETY § 120370.

G. AB 2109: AMENDING CAL. HEALTH AND SAFETY CODE SECTION 120365

In response to the growing anti-vaccination movement, the California legislature passed AB 2109 in late 2012.¹¹⁷ This bill required parents to see a pediatrician or health-care practitioner before obtaining a religious or personal-belief exemption for their children.¹¹⁸ However, upon signing the bill, Governor Brown added a directive that allowed for a separate religious exemption on the form.¹¹⁹ The bill went into effect in January 2014.¹²⁰ In the first year of the bill's implementation, 20 percent fewer parents used the personal-belief exemption.¹²¹

H. EXCLUDING UNVACCINATED STUDENTS FROM PUBLIC SCHOOLS

Currently, California schools may exclude unvaccinated children during instances of an outbreak. The California Department of Public Health is vested with this ability to exclude students during outbreaks, which is outlined in the affidavit for personal-belief exemptions.¹²² The specific regulation authorizing the Public Health Department to exclude unvaccinated students is 17 California Code of Regulations section 6060.¹²³ In cases of an outbreak, such as that of measles early in 2015, a local health officer

¹¹⁷ An Assembly Bill Mandating Physician Consultation for Religious and Personal Belief Exemptions, A.B. 2109, 2012 Sess. (C.A. 2012), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB277 [hereinafter AB 2109 Bill Text].

¹¹⁸ *Id.*

¹¹⁹ *Jerry Brown Signs Bill Requiring Signatures for Those Opting Out of Vaccinations*, Capitol Alert, THE SAC. BEE (Sept. 30, 2012), <http://blogs.sacbee.com/capitolalertlatest/2012/09/jerry-brown-signs-bill-requiring-signatures-for-those-opting-out-of-vaccinations.html> [hereinafter Capitol Alert].

¹²⁰ *Id.*

¹²¹ David Greenwald, *Legislation Introduced That Would End California's Vaccine Exemption Loophole*, THE PEOPLE'S VANGUARD OF DAVIS (Feb. 6, 2015), <http://www.davisvanguard.org/2015/02/legislation-introduced-that-would-end-californias-vaccine-exemption-loophole/>.

¹²² Giana Magnoli, *Hope School District Cleared to Exclude Unvaccinated Students in Case of Measles Outbreak*, NOOZHAWK (May 5, 2015, 11:21 AM), http://www.noozhawk.com/article/hope_school_district_could_exclude_unvaccinated_students_during_outbreak; Personal Beliefs Exemption to Required Immunizations, <http://eziz.org/assets/docs/CDPH-8262.pdf> (last visited Apr. 20, 2015).

¹²³ CAL. CODE REGS. tit. 17, § 6060 (2015).

will decide whether a specific school district may exclude unvaccinated children.¹²⁴

While there are parents who are against exclusion of unvaccinated students from public schools, there are also parents who are pushing this further and are calling for the exclusion of unvaccinated children from public schools whether or not an outbreak has occurred.¹²⁵ An illustrative case for this need is found in Rhett Krawitt.¹²⁶ Rhett is a six-year-old student in Marin County, California, who fought leukemia for the last five years.¹²⁷ As a result of his chemotherapy, he is unable to be vaccinated because his immune system is still rebuilding.¹²⁸ While the measles may not be as serious for any other student, it would be extremely debilitating to Rhett.¹²⁹ This is one of the situations that SB 277 is attempting to address.

III. THE CONSTITUTIONALITY OF SB 277

SB 277 was introduced on February 19, 2015 by Senator Richard Pan (D-Sacramento), a pediatrician, and Senator Ben Allen (D-Santa Monica), a professor and attorney.¹³⁰ SB 277 seeks to combat the danger arising out of a growing population of unvaccinated children by eliminating the religious and personal-belief exemptions from the California Health and Safety Code. The approval of this bill would make California one of three states that offer only a medical exemption to state vaccination laws (the other two being Mississippi and West Virginia).¹³¹ This section addresses how SB 277 alters California's vaccination laws, the criticisms of SB 277, and the constitutionality of the bill [signed into law by the governor, June 30, 2015].

¹²⁴ Magnoli, *supra* note 122.

¹²⁵ Aliferis, *supra* note 14.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ SB 277 Bill Text, *supra* note 16.

¹³¹ *State Vaccination Exemptions*, NAT'L VACCINE INFO. CENTER, http://www.nvic.org/CMSTemplates/NVIC/pdf/state-vaccine-exemptions_blue.pdf (last visited Mar. 29, 2015).

A. THE TERMS OF SB 277

On April 22, 2015, an amended version of Senate Bill 277 was passed by the California Senate Education Committee.¹³² This bill would remove both the religious and personal-belief exemptions from California's vaccination mandate for students, requiring unvaccinated students to receive a "home-based private school" or "independent study" education.¹³³ The amended bill specifically addresses concerns that unvaccinated children would have difficulty accessing an education by broadening an exemption for home-schooled children.¹³⁴ Under this broadened amendment, multiple families would be able jointly to homeschool their unvaccinated children.¹³⁵ Furthermore, unvaccinated children would be allowed to enroll in independent-study programs run by school systems.¹³⁶ If SB 277 passes, this would also negate AB 2109, which requires consultation with a pediatrician or health care practitioner before applying for a religious or personal-belief exemption.¹³⁷

On April 28, 2015, the Senate Judiciary Committee passed the bill, as amended to clarify that the bill would only mandate vaccinations for ten diseases: diphtheria, hepatitis B, haemophilus influenza type b, measles, mumps, pertussis (whooping cough), poliomyelitis, rubella, tetanus, and varicella (chickenpox).¹³⁸ Any additional vaccinations would need to be deemed appropriate by several health groups and departments.¹³⁹ Furthermore, on June 10, 2015, the Assembly Health Committee passed the bill with an amendment that specifies that a licensed physician may consider

¹³² *Senators Richard Pan and Ben Allen's SB 277 Passes Senate Education Committee on Bipartisan Vote*, CALIFORNIA SENATOR RICHARD PAN (Apr. 22, 2015), <http://sd06.senate.ca.gov/news/2015-04-22-senators-richard-pan-and-ben-allen%E2%80%99s-sb-277-passes-senate-education-committee>.

¹³³ SB 277 Bill Text, *supra* note 16.

¹³⁴ *Id.*

¹³⁵ Capitol Alert, *supra* note 119.

¹³⁶ *Id.*

¹³⁷ SB 277 Bill Text, *supra* note 16.

¹³⁸ Senate Judiciary Committee, *Media Archive*, CALIFORNIA STATE SENATE (Apr. 28, 2015), <http://senate.ca.gov/media-archive> [hereinafter Senate Judiciary Committee Video].

¹³⁹ SB 277 Bill Text, *supra* note 16.

family medical history when evaluating the necessity of a medical exemption for a child.¹⁴⁰

Those opposed to SB 277 have raised several primary points of concern. The first is the idea that the bill violates the religious and parental rights of parents and children who oppose vaccinations for religious reasons.¹⁴¹ The second is that the bill discriminates against a “class” of unvaccinated and partially vaccinated children.¹⁴² Third, anti-vaccinators argue that the bill would interfere with a child’s right to a public education.¹⁴³ Lastly, opponents of the bill claim that there is no compelling interest in this case because there is no pressing or medically verified need to pull unvaccinated children from public schools.¹⁴⁴

B. GOVERNMENT INTEREST IN MANDATING VACCINATIONS IN PUBLIC SCHOOLS TO PRESERVE PUBLIC SAFETY TRUMPS RELIGIOUS AND PARENTAL RIGHTS

While the exclusion of unvaccinated students during an outbreak is standard procedure across the nation, there have been cases challenging the constitutionality of these directives. *Phillips v. City of New York*,¹⁴⁵ a recent New York federal district court case, addressed whether the exclusion policy violated the rights of children exempted on religious grounds.¹⁴⁶ The court ruled that there is no constitutional right to a religious vaccine-exemption.¹⁴⁷ The court noted that the Supreme Court has “strongly suggested that religious objectors are not constitutionally exempt from vaccinations” under *Jacobson v. Massachusetts*, and that sister courts in its Eastern District have rejected a constitutional exemption from vaccinations.¹⁴⁸

¹⁴⁰ *Id.*

¹⁴¹ Senate Education Committee, *Media Archive*, CALIFORNIA STATE SENATE (Apr. 15, 2015), <http://senate.ca.gov/media-archive> [hereinafter Senate Education Committee Video 1].

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Senate Judiciary Committee Video, *supra* note 138.

¹⁴⁵ 27 F. Supp. 3d 310 (E.D.N.Y. 2014).

¹⁴⁶ *Phillips v. City of New York*, 27 F. Supp. 3d 310, 311 (E.D.N.Y. 2014).

¹⁴⁷ *Id.* at 312.

¹⁴⁸ *Id.*

This case suggests that laws which interfere with individual liberties in the name of public health, such as SB 277, may be valid.¹⁴⁹ Furthermore, this case affirms that California does not have to provide a religious exemption from mandated vaccinations in public schools in the name of protecting public health and safety.¹⁵⁰ *Prince v. Massachusetts* further confirms that freedom of religious practice and a parent's authority to raise his or her children does not trump the state's interest in protecting the welfare of children.¹⁵¹ This Court was also specific about how this principle applied to the vaccination of children, strongly noting that individual preference to raise one's children does not warrant exposing the community and its children to preventable diseases that could ultimately lead to illness or death.¹⁵²

C. THE BILL DOES NOT UNCONSTITUTIONALLY DISCRIMINATE AGAINST A "CLASS" OF UNVACCINATED OR PARTIALLY VACCINATED CHILDREN

Opponents of the bill have compared the effect of this bill to the "separate but equal" state of the public-education system before *Brown v. Board of Education*.¹⁵³ While the anti-vaccinators' legal argument for this assertion is vague, it appears there are two primary points of contention. The first is that it is discriminating against a class of children whose parents refuse vaccinations as a result of religious or personal beliefs, in effect discriminating against people of that particular faith or personal belief.¹⁵⁴ But while the state has a duty to uphold religious exemptions when they are legislated in place, as noted above, there is no underlying constitutional requirement for the states to enact a religious or personal-belief exemption. As held in *Phillips*, such convictions do not trump the state's interest in preserving community health.¹⁵⁵ Therefore, this argument does not hold.

The second argument appears to be a type of disabilities-discrimination claim. Various parents testified at the Senate Committee hearings on SB 277 that they were unable to obtain a medical exemption for their

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 312–13.

¹⁵¹ *Prince v. Massachusetts*, 321 U.S. 158, 173–74 (1944).

¹⁵² *Id.* at 166–67.

¹⁵³ Senate Education Committee Video 1, *supra* note 141.

¹⁵⁴ *Id.*

¹⁵⁵ *Phillips v. City of New York*, 27 F. Supp. 3d 310, 312 (E.D.N.Y. 2014).

“vaccine injured” children.¹⁵⁶ Anti-vaccinators argue that the bill discriminates against these children who are vaccine-injured, have the potential to become vaccine-injured, or have a condition that may not fall into a clear medical exemption but may cause the child to face higher risks with respect to certain vaccinations.¹⁵⁷ As Senator Pan noted in the Senate Judiciary Committee hearing held on April 28, 2015, “vaccine injured” is not a medical term, but a term of art used by opponents to the bill to explain a wide range of reactions to vaccines.¹⁵⁸ These “vaccine injured” children may range from death, to the inability to speak for 24 hours, to various minor reactions.¹⁵⁹ Children may be termed “vaccine injured” even if the vaccine was not linked to the injury (for instance, when the injury was coincidental to receiving the vaccine).¹⁶⁰ The United States has a no-fault compensatory infrastructure for those who suffer a reaction to a vaccine under the National Childhood Vaccine Injury Act of 1986.¹⁶¹ In order to receive compensation under this system, the United States Court of Federal Claims must find by a preponderance of the evidence that the child sustained or suffered significant aggravation of an illness, disability, injury, or condition as a result of a vaccine.¹⁶²

It is not clear whether the opponents of the bill will attempt to bring a disabilities-discrimination claim under the individual right to equal protection. The Equal Protection Clause of the Fourteenth Amendment states that no state will “deny to any person within its jurisdiction the equal protection of the laws.”¹⁶³ In order to succeed on an equal-protection claim, the plaintiff must demonstrate that he or she was treated differently than others who occupied a position similar to the plaintiff’s and that the

¹⁵⁶ Senate Judiciary Committee Video, *supra* note 138; Senate Education Committee Video 1, *supra* note 140; Senate Education Committee, *Media Archive*, CALIFORNIA STATE SENATE (Apr. 22, 2015), <http://senate.ca.gov/media-archive> [hereinafter Senate Education Committee Video 2].

¹⁵⁷ Senate Judiciary Committee Video, *supra* note 138

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ 42 U.S.C. § 300aa-11.

¹⁶² *Id.* at (c)(1); Snyder ex rel. Snyder v. Secretary of Health and Human Services, 88 Fed. Cl. 706, 740 (2009).

¹⁶³ U.S. CONST. amend. XIV.

unequal treatment was both intentional and unjustified.¹⁶⁴ The court in *Workman v. Mingo County Board of Education*¹⁶⁵ noted that there is no facial discrimination on the basis of religion because the state is not required to provide a religious exemption and did not target a particular religious belief.¹⁶⁶ In this case, the plaintiff claimed that the defendant, the Mingo County Board of Education, violated her constitutional rights when the Board refused to admit her unvaccinated daughter, M.W., to public school.¹⁶⁷ The plaintiff chose not to vaccinate M.W. because her other child, S.W., had begun to suffer health problems that appeared around the same time that S.W. received vaccinations.¹⁶⁸ The plaintiff received a medical exemption for M.W., but this was later denied when a school nurse challenged the exemption.¹⁶⁹ One of the plaintiff's primary arguments was that the vaccination statute was facially discriminatory because it did not provide a religious exemption.¹⁷⁰ The court rejected her claim because she did not explain how the statute was facially discriminatory.¹⁷¹ The court further reasoned that the plaintiff's complaint was not that the statute targeted a particular religion, but that it did not provide an exemption for her personal religious beliefs.¹⁷² This reasoning indicates that anti-vaccinators must clearly demonstrate discriminatory impact or intentional targeting of a specific protected class for the court to consider a facial discrimination claim. Here, the plaintiff demonstrated only that the mandate goes against her personal beliefs, but not necessarily individuals who practice a particular religion.

Furthermore, a claim that the bill is facially discriminatory against "vaccine injured" children would not be valid. This argument should not hold in court because "vaccine injured" children are a vague and unrecognized "class" who are also not categorized as disabled.¹⁷³ Additionally, the

¹⁶⁴ *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001).

¹⁶⁵ *Workman v. Mingo County Bd. of Educ.*, 419 Fed. Appx. 348 (4th Cir. 2011).

¹⁶⁶ *Id.* at 354–56.

¹⁶⁷ *Id.* at 350–51.

¹⁶⁸ *Id.* at 351.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 355.

¹⁷² *Id.*

¹⁷³ Senate Judiciary Committee Video, *supra* note 138.

bill still provides a medical exemption for children who may suffer from vaccinations.¹⁷⁴ In this case, the duty should be on the doctor to provide an appropriate ground for medical exemption. In fact, the amended version of the bill specifically notes that a licensed physician may deem that a child should not be vaccinated due to family medical history, which would include a family member's previous adverse reactions to a vaccination. In comparison, this bill would not have the discriminatory effect that *Wong Wai v. Williamson* had. In that case, the potentially deadly bubonic-plague vaccination was specifically directed toward the Asian race "without regard to the previous condition, habits, exposure to disease, or residence of the individual."¹⁷⁵ In other words, that class-based vaccination was not a calculated and reasonable mandate meant to preserve the public health of the community. SB 277 does not unnecessarily target a group of children regardless of legitimate health concerns.

D. THE DEBATE SURROUNDING THE RIGHT TO A PUBLIC SCHOOL EDUCATION

While the amendment broadens the educational options for unvaccinated or partially vaccinated children, critics continue to view this as an unconstitutional infringement on their children's right to a free public education.¹⁷⁶ Since 1879, article IX, section 5, of the California Constitution has guaranteed a free public-school education, specifically noting that the "Legislature shall provide for a system of common schools by which a free school shall be kept up and supported."¹⁷⁷ In *Serrano v. Priest*, the California Supreme Court held that education was a "fundamental" interest guaranteed by the California Constitution.¹⁷⁸ The right to a free public school education is distinctly a matter of California, as opposed to federal, law.

In 1940, the State Board of Education implemented a regulation to uphold the "free school guarantee."¹⁷⁹ Title 5, California Code of Regulations, section 350, specifies that a student "shall not be required to pay any

¹⁷⁴ SB 277 Bill Text, *supra* note 16.

¹⁷⁵ *Wong Wai v. Williamson*, 103 F. 1, 7 (N.D. Cal. 1900).

¹⁷⁶ Senate Judiciary Committee Video, *supra* note 138.

¹⁷⁷ CAL. CONST. art. IX, § 5.

¹⁷⁸ *Serrano v. Priest*, 5 Cal. 3d 584, 589 (1971).

¹⁷⁹ CAL. CODE REG. tit. 5, § 350.

fee, deposit, or other charge not specifically authorized by law.”¹⁸⁰ These prohibited fees were clarified by the California attorney general and included fees like security deposits, membership fees for organizations, and necessary school supplies.¹⁸¹ The Court reaffirmed and clarified how the educational guarantee functions in *Butt v. State of California*, noting that the California Constitution “prohibits maintenance and operation of the public school system in a way which denies basic educational equality to the students of particular districts.”¹⁸²

The California Supreme Court has since ruled on various fees that were allegedly in violation of the California Constitution’s “free school guarantee.” While fees for educational extracurricular activities, driving classes offered through the school district, and to compensate for lost state funding due to unexcused absences were unconstitutional, fees that were legitimately educational in nature were valid.¹⁸³ The following fees were also found not to be contrary to the “free school guarantee”: optional attendance as an observer at a school event, food, replacement costs for materials that a student failed to return or deliberately defaced, field trips, transportation to school (so as long as indigent students could receive a waiver for the fee), medical insurance for field trips, physical-education attire, parking, direct cost of materials for projects kept by the student, duplication of public records, summer-employment transportation fees, out-of-state tuition fees, fingerprinting programs, deposits for musical instruments and other regalia that are taken overseas, and eye-safety devices.¹⁸⁴

1. SB 277 Does Not Violate the “Free School Guarantee”

Those who oppose SB 277 argue that this mandate eliminates the “free school guarantee” for unvaccinated students. While private homeschooling and independent study are options, these can be time-intensive and at times, costly.¹⁸⁵ The opposition has also brought up the concern that single parents

¹⁸⁰ *Id.*

¹⁸¹ OPS. CA. ATTY. GEN. NO. NS-4114.

¹⁸² *Butt v. State of California*, 4 Cal. 4th 668, 685 (1992).

¹⁸³ *Guidelines for District Staff and Parents Regarding Student Fees, Donations and Fundraising*, SAN DIEGO UNITED SCHOOL DIST., <http://www.sandi.net/Page/2570> (last visited Apr. 13, 2015).

¹⁸⁴ *Id.*

¹⁸⁵ Senate Education Committee Video 1, *supra* note 141.

or two-parent households with insufficient income would be unable to put their children in any homeschooling or independent study options.¹⁸⁶

This argument does not have a strong foothold in California, as there are free-homeschooling options available for students.¹⁸⁷ These options include programs offered by public school districts, charter schools, and online education.¹⁸⁸ Though parents may argue that the quality of the free-homeschooling option available to them is not agreeable, this does not invalidate the fact that there are free-homeschooling and independent-study options for California students that would suffice to satisfy the “free school guarantee.” Furthermore, under the second set of amendments by the Senate Education Committee, families now have more options to homeschool their children jointly with other families, alleviating the pressure on families who may not have as much time to care for their children.¹⁸⁹

2. *Subjecting the Mandate to Strict Scrutiny*

While the American Civil Liberties Union (ACLU) agrees with the mandatory vaccination of children, the civil rights group argues that SB 277 lacks a “compelling interest” in requiring all students in schools to be vaccinated.¹⁹⁰ United States courts apply “strict scrutiny” in two situations: when a fundamental constitutional right is infringed,¹⁹¹ or when a government action applies to a “suspect classification.”¹⁹² In this situation, the right to education in California is considered a fundamental constitutional right that has been

¹⁸⁶ *Id.*

¹⁸⁷ *Free Public Homeschool Options in California*, HUBPAGES (Sept. 2, 2014), <http://learnthingsweb.hubpages.com/hub/Free-Homeschool-Options-in-Southern-California> (last visited Apr. 13, 2015).

¹⁸⁸ *Id.*

¹⁸⁹ Senate Education Committee Video 2, *supra* note 156.

¹⁹⁰ Kevin Baker, *ACLU Statement: SB 277, California Vaccination Bill*, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CAL. (Apr., 28, 2015), <https://www.aclunc.org/news/aclu-statement-sb-277-california-vaccination-bill> [hereinafter ACLU Statement].

¹⁹¹ *Graham v. Kirkwood Meadows Pub. Util. Dist.*, 21 Cal.App.4th 1631, 1642 (1994) (“California has followed the two-tier approach employed by the United States Supreme Court in reviewing legislative classifications under the equal protection clause.”); *Kevoorkian v. Arnett*, 939 F. Supp. 725, 732 (1996) (“Under this test, strict scrutiny is applied in cases involving suspect classifications or fundamental rights; rational basis analysis is applied to all other cases.”).

¹⁹² *Roe v. Wade*, 410 U.S. 113, 155 (1973).

reaffirmed by the California Supreme Court.¹⁹³ Therefore, strict scrutiny would apply as a matter of California, rather than federal, constitutional law.

In order to survive strict scrutiny, the law or policy must satisfy three tests: it must be justified by a compelling government interest,¹⁹⁴ it must be narrowly tailored,¹⁹⁵ and it must be the least restrictive means for achieving that interest.¹⁹⁶ California's Legislative Analysts note that the ACLU opposes SB 277 because it conditions access to California's "free school guarantee" without a showing of a "compelling interest."¹⁹⁷ When evaluating the constitutionality of vaccination mandates, courts weigh individual liberties and the necessity of governmental interference into these liberties to preserve public health and safety.¹⁹⁸ According to Professor Lawrence Gostin, four overlapping standards are taken into consideration in weighing these interests: necessity, reasonable means, proportionality, and harm avoidance.¹⁹⁹ These standards should be taken into consideration when addressing the strict-scrutiny test.

3. *The Compelling Interest of Public Health and Safety of California's Public School Students*

The authors of SB 277 have articulated the government's compelling interest. In its non-partisan bill analysis, the Senate Judiciary Committee notes

¹⁹³ *Serrano v. Priest*, 5 Cal. 3d 584, 589 (1971).

¹⁹⁴ *Somers v. Superior Court*, 172 Cal. App. 4th 1407, 1412 (2009) ("But if the statutory scheme imposes a suspect classification, such as one based on race [citation], or a classification which infringes on a fundamental interest . . . the classification must be closely scrutinized and may be upheld only if it is necessary for the furtherance of a compelling state interest.") (quoting *Weber v. City Council*, 9 Cal. 3d 950, 959 (1973)).

¹⁹⁵ *Griffiths v. Superior Court*, 96 Cal. App. 4th 757, 775 (2002) ("If a challenged law operates to the peculiar disadvantage of a suspect class or impinges on a fundamental right, this court subjects it to the severe standard of 'strict scrutiny.' Under strict scrutiny, a discriminatory law will not be given effect unless its classification bears a close relation to promoting a compelling state interest, the classification is necessary to achieve the government's goal, and the classification is narrowly drawn to achieve the goal by the least restrictive means.").

¹⁹⁶ *Id.*

¹⁹⁷ SB 277 Bill Analysis, CAL. COMMITTEE ON HEALTH (Apr. 8, 2015), http://leginfo.ca.gov/pub/15-16/bill/sen/sb_0251-0300/sb_277_cfa_20150407_101248_sen_comm.html.

¹⁹⁸ *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944).

¹⁹⁹ Lawrence Gostin, *Jacobson v. Massachusetts at 100 Years: Police Power and Civil Liberties in Tension*, 95(4) AM. J. PUB. HEALTH 1, 576–81 (2005).

that the government's compelling interest is to preserve the health and safety of the students in California's public school system by increasing herd immunity and protecting vaccine-deprived children from disease.²⁰⁰ This interest has been continuously affirmed in both California and United States Supreme Court cases, including *Zucht v. King*²⁰¹ and *Prince v. Massachusetts*.²⁰² Furthermore, as noted above, *Williams v. State* suggests that the school has an affirmative duty to ensure the safety of its students.²⁰³

4. *The Bill is Narrowly Tailored and Achieves its Goals*

In order for the bill to meet strict scrutiny, it must also be narrowly tailored.²⁰⁴ The law is narrowly tailored when it targets only that interest.²⁰⁵ It is not narrowly tailored when it is overbroad or fails to address the essential aspects of that compelling government interest.²⁰⁶

The opposition argues that this bill is not narrowly tailored because vaccinations do not necessarily protect the public from communicable diseases.²⁰⁷ Anti-vaccinators argue that non-vaccinated children do not necessarily lack immunity, while vaccinated children may not necessarily be protected.²⁰⁸ An exchange between Senator Heff and Senator Pan during the Senate Education Committee hearing illustrates this dilemma.²⁰⁹ During the April 15 hearing, Senator Robert Heff (R-Diamond Bar) noted that chickenpox may be transmitted six weeks after receiving the vaccination, and yet these recently immunized children are not sheltered from immunocompromised children.²¹⁰ Senator Pan noted that no vaccination

²⁰⁰ SB 277 Bill Analysis, SENATE JUDICIARY COMMITTEE (Apr. 22, 2015), http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0251-0300/sb_277_cfa_20150427_153640_sen_comm.html [hereinafter SB277 Judiciary Bill Analysis].

²⁰¹ 260 U.S. 174 (1922).

²⁰² 321 U.S. 158 (1944).

²⁰³ *Williams v. State of California Settlement Notice*, *supra* note 58.

²⁰⁴ *Wade*, 410 U.S. at 155.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ Senate Education Committee Video 1, *supra* note 141.

²⁰⁸ Alan Phillips, *Vaccine Exemptions: Do They Really Put Others At Risk?*, NATURAL NEWS (Feb. 18, 2012), http://www.naturalnews.com/035024_vaccine_exemptions_children_infectious_disease.html.

²⁰⁹ Senate Education Committee Video 1, *supra* note 141.

²¹⁰ *Id.*

provides full protection from disease, but can provide near-perfect coverage.²¹¹ In the case of chickenpox, the infectious agents created by recent vaccinations would be less potent than “wild” chickenpox.²¹² Furthermore, the Federal Drug Administration sets the highest bar for potential risk that is unavoidable but very minimal.²¹³ He also acknowledges that every vaccination is different for every child, and certain vaccinations, such as that for whooping cough, are not as effective as others, like those for measles.²¹⁴

Here, it is evident that this dilemma is caused by conflicting medical opinions. Supporters of the bill see the risks posed by vaccination as extremely minimal and necessary to preserving community health, while those who oppose it see vaccination as a potentially deadly choice that may ultimately make no difference in protecting herd immunity.²¹⁵ However, as noted in Part I, studies show that this is not true. The rate of personal-belief exemptions has in fact risen over the past decade, and there are school districts where the herd immunity levels fall far below the 90 percent rate.²¹⁶ This is because parents against vaccination tend to cluster in high-income communities, leading that particular community to be particularly susceptible to disease.²¹⁷ Senator Pan and various accounts of the recent Disneyland measles outbreak have reported that the measles tended to travel in those communities with higher personal-belief exemptions.²¹⁸ This is the case even with AB 2109 in place. Ultimately, the Legislature will need to weigh the credibility of these conflicting medical opinions. By removing unvaccinated and partially vaccinated children from public schools, the bill would ensure the safety of vaccine-deprived children while rapidly increasing the herd immunity of public schools. As noted earlier in Part IIID, the children removed from public schools would also still have reasonable access to their right to a free public education through alternative schooling, such as homeschooling and independent study.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Supra*, notes 45–46.

²¹⁷ *Supra*, notes 41–42.

²¹⁸ Senate Education Committee Video 1, *supra* note 141.

5. *The Bill is the Least Restrictive Means for Achieving Public Safety and Health in Public Schools*

Lastly, the bill must be the least restrictive means of achieving the government's compelling interest.²¹⁹ If there is an alternative method that achieves the same interests but causes less interference with the rights of the affected children, this bill would be considered unconstitutional.²²⁰ The bill's opposition may find the most merit in this argument.

The bill seeks to remove unvaccinated and partially vaccinated children from California's public school in an effort to protect the community from outbreaks (ideally keeping all schools and districts over 90 percent in all vaccinations) and to protect children who are medically exempt from vaccinations from being subject to vaccine-preventable diseases.²²¹ Opponents will argue that AB 2109 better serves the bill's purpose, citing the 20 percent drop in personal-belief exemptions since the beginning of 2014.²²² The American Civil Liberties Union also contends that AB 2109 has had a short history in which to see results, but that the 20 percent drop in the use of personal-belief exemptions is a positive step toward achieving the same interests as SB 277.²²³

While AB 2109 has been relatively effective, it does not guarantee that school districts that have herd immunity rates below 90 percent would increase their rates to a safe level. This also places immunocompromised children such as Rhett Krawitt at high risk of contracting disease. This would then place the responsibility on Krawitt's parents, instead of the parents utilizing the personal-belief exemptions, to remove their child from public school to avoid exposure to others who can more readily transmit diseases to him. Therefore, AB 2109 does not meet the compelling government interest that SB 277 seeks to achieve.

²¹⁹ *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 656 (2004).

²²⁰ *Id.*

²²¹ SB277 Judiciary Bill Analysis, *supra* note 200.

²²² Robin Abcarian, *Fight Against Vaccination Bill Finds Ally in ACLU*, L.A. TIMES (Apr. 24, 2015, 4:30 AM), <http://www.latimes.com/local/abcarian/la-me-abcarian-vaccination-bill-20150424-column.html>.

²²³ *Id.*

E. A COMPARATIVE LOOK AT MASSACHUSETTS AND WEST VIRGINIA

California's vaccination debate is unique because it is one of only a few states that have a constitutional right to a public education and yet is removing both its religious and personal-belief exemptions. This would place California in the small minority of states that have only a medical exemption; the other two are Massachusetts and West Virginia.²²⁴ This section analyzes how the lack of religious and personal-belief exemptions have impacted case law in these states.

The Supreme Court of Appeals of West Virginia case, *D.J. v. Mercer County Board of Education*, similarly addressed the issue of the conflict between the right to be healthy and the right to access a public education.²²⁵ In this case, a child, T.J., was previously and fully vaccinated according to West Virginia's immunization code.²²⁶ However, new vaccinations were required by West Virginia's interpretive rule.²²⁷ The plaintiffs, the parents of T.J., argued that West Virginia's Department of Health and Human Resources (DHHR) exceeded its authority by enacting this rule; that its enforcement of the rule was discriminatory; and that the rule denied children the fundamental right to an education.²²⁸

In finding against the plaintiffs and for the Board of Education, the court analyzed whether the government met the strict-scrutiny test.²²⁹ West Virginia also recognizes that education is a fundamental right in the state.²³⁰ The court subjected the law to strict scrutiny, which required a compelling government interest, narrow tailoring, and least restrictive means in order to pass the test.²³¹ The court concluded that the compelling interest was satisfied because "the protection of the health and safety of the public is one of the most important roles of the State."²³² Furthermore,

²²⁴ *State Vaccination Exemptions for Children Entering Public Schools*, *supra* note 7.

²²⁵ *D.J. v. Mercer County Bd. of Educ.*, No. 13-0237, 2013 WL 6152363, at *1 (S.E. 2d Nov. 22, 2013).

²²⁶ *Id.* at *1.

²²⁷ *Id.*

²²⁸ *Id.* at *2.

²²⁹ *Id.* at *4.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

it noted that the schools are responsible for maintaining the health of children.²³³ The court did not extensively consider whether mandatory vaccinations are overbroad or the least restrictive means of meeting this compelling interest, as it relied on West Virginia's existing mandatory-vaccination laws.²³⁴ While this case may not be exactly parallel to California's case, as California is in the position of repealing its religious and personal belief exemptions as opposed to maintaining medical-only exemptions, this case further affirms that the elimination of religious and personal-belief exemptions to school vaccinations is constitutional.

IV. ADDITIONAL CONSIDERATIONS

Although the bill may be constitutional, there are additional concerns the Legislature should consider as it moves forward with the mandate. The first is low-income-household access to vaccinations. Second is making a concerted effort to update its vaccination laws to balance concerns about vaccinations and future biomedical advances.

A. ACCESS TO VACCINATIONS

The ACLU issued a statement on April 28, 2015, clarifying its stance on SB 277.²³⁵ Though the ACLU was previously seen as an ally to the bill's opposition, it states that it remains neutral on the bill because of its potential impact on low-income families. Specifically, it points out that in some cases, children are not vaccinated because "parents lack knowledge, have poor access to health care, face transportation problems, or other barriers." The California Legislature and school systems should have responsibility to mitigate these issues and ensure that children are not being penalized for being unable to obtain vaccines as a result of their families' financial status. The authors of the bill have expressed their willingness to work with school districts to maintain access to California's public school system.²³⁶ Accordingly, the California Legislature should work with school districts to create on-site vaccination programs, to hold educational programs and

²³³ *Id.*

²³⁴ *Id.*

²³⁵ ACLU Statement, *supra* note 190.

²³⁶ Senate Judiciary Committee Video, *supra* note 138.

create materials for parents to learn about vaccinations, and to create a process for families who may be unable to afford the vaccinations.

B. MEDICAL ADVANCES

The anti-vaccination debate is, of course, an offshoot of a division in opinion as to whether vaccinations are medically necessary. California, West Virginia, and Massachusetts would have the same vaccination requirements if SB 277 passes: diphtheria, hepatitis B, haemophilus influenza type b, measles, mumps, pertussis (whooping cough), poliomyelitis, rubella, tetanus, varicella (chickenpox), and meningitis (primarily for postsecondary education).²³⁷ These states have provisions that would allow for various health authorities to alter the specific list of mandatory vaccinations.²³⁸

As the country continues to make medical advances, it is possible that certain vaccinations may become obsolete, or alternative medications may become available that are equally effective as current vaccinations. One Note suggests distinguishing vaccines by two types of “necessity” for the public health or safety of the community.²³⁹ The first would be a “medical necessity” and the second a “practical necessity.”²⁴⁰ “Medically necessary” vaccines are those that are the only known viable defenses against a disease in the community.²⁴¹ “Practically necessary” vaccines are those where there are efficacious alternatives, but these alternatives are not used by a significant number of people.²⁴² This Note suggests that vaccines not be permanently relegated to either of these categories.²⁴³ Instead, whether a vaccine is “medically or practically necessary” would be dependent on future biomedical advances.

The Note emphasizes the need for this distinction in order to preserve civil liberties. According to Professor George Annas, compromising civil liberties would undermine the public’s trust, “an essential ingredient in

²³⁷ SB 277 Bill Text, *supra* note 16; Mass. Gen. Laws ch. 76, § 15 (2015), W. Va. Code § 64-95-4 (2015).

²³⁸ *Id.*

²³⁹ Harvard Law Review, *Toward a Twenty-First-Century Jacobson v. Massachusetts*, 121 HARV. L. REV. 1820, 1820 (2008).

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.* at 1840.

any well-operating public health endeavor.”²⁴⁴ By having tailored vaccination mandates specific to the type of vaccine and effective alternatives, it allows individual choice, but “minimizes the number of opt-outs.”²⁴⁵ This would demonstrate to the community that the legislature is keeping its laws up-to-date with legitimate biomedical advances and balancing the concern of parents who are against vaccination with the current availability of equally efficacious alternatives to vaccination.

V. CONCLUSION

The focus of the vaccination debate should be the health and wellbeing of children — one of the most vulnerable classes of people in our society. As the courts across the nation have concluded, the interest in preserving the wellbeing of our children and the community is so critical that it takes precedence even when in conflict with individual liberties. This is because the ability to exercise individual freedoms should not unreasonably impinge on the welfare of the whole. As such, the legislature may create public health legislation that interferes with individual rights so long as it is narrowly tailored, reasonable, and the least restrictive means of doing so. SB 277 meets all of these requirements without interfering unduly with the child’s right to a public education. Accordingly, the courts should find this bill to be constitutional under both California and federal law.

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²⁴⁴ *Id.* at 1835.

²⁴⁵ *Id.* at 1841.