Notre Dame Law Review

Volume 76 | Issue 1 Article 5

11-1-2000

Children and Spiritual Healing: Having Faith in Free Exercise

David E. Steinberg

CHILDREN AND SPIRITUAL HEALING: HAVING FAITH IN FREE EXERCISE

*David E. Steinberg**

> [T]he values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society.[1]
>
> ***
>
> There can be no assumption that today's majority is "right" and the Amish and others like them are "wrong." A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.[2]
>
> ***
>
> Recently the Portland exurb of Oregon City has been shaken by what appears to be an ongoing horror in its midst. In June [1998], Oregon state medical examiner Larry Lewman stated suspicions about . . . the 1,200 member Followers of Christ church. Over 10 years, he alleges, the faith-healing congregation's avoidance of doc-

* Associate Professor, Thomas Jefferson School of Law. B.A., Northwestern University, 1982; J.D., Stanford Law School, 1986. Thanks to Alfredo Gomez and Kelley Johnson for their excellent research assistance.

1 Wisconsin v. Yoder, 406 U.S. 205, 213–14 (1972).

2 *Id.* at 223–24.

tors and hospitals may have cost the lives of 25 children, some under excruciating circumstances.[3]

INTRODUCTION

Cases involving children and spiritual healing raise one of the most pointed conflicts between the free exercise of religion and the State's indisputable interest in protecting the health and welfare of its citizens.[4] Precedent and tradition support the rights of parents to direct the religious upbringing of their children.[5] The vast majority of States have recognized these parental rights in statutory exemptions.[6] To varying degrees, these exemptions restrict the ability of a State to mandate that faith healing believers treat their children with conventional medical care. These exemptions also typically limit a State's ability to bring criminal charges against a parent whose choice of spiritual healing has caused a child to suffer harm.[7]

The long tradition of toleration toward spiritual healing may be changing. Reports from Oregon City and elsewhere of children who die unnecessary and painful deaths have horrified readers.[8] During

3 David Van Biema, *Faith or Healing? Why the Law Can't Do a Thing About the Infant-Mortality Rate of an Oregon Sect*, TIME MAG., Aug. 31, 1998, at 68.

4 Spiritual healing is premised on a fundamentally different view of illness than the views accepted by mainstream society. Conventional thought views most illness as rooted in physical or biological causes. Spiritual healing views illness as resulting from a lack of faith. A person may recover from an illness only by restoring his or her faith through prayer. *See* Walker v. Superior Court, 763 P.2d 852, 855 n.1 (Cal. 1988) (describing the beliefs of faith healing practitioners); Jennifer L. Rosato, *Putting Square Pegs in a Round Hole: Procedural Due Process and the Effect of Faith Healing Exemptions on the Prosecution of Faith Healing Parents*, 29 U.S.F. L. REV. 43, 44 n.2 (1994) (same).

5 *See infra* Part II.

6 *See* James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321, 1354 (1996) (stating that forty-six states have adopted spiritual healing exemptions); Rosato, *supra* note 4, at 51–57 nn.41–74 (citing spiritual healing exemptions adopted in forty-six states).

7 *See* Dwyer, *supra* note 6, at 1354.

8 *See generally* Lynne Bumpus-Hooper, *Melbourne Boy Likely Suffered for Hours*, ORLANDO SENTINEL, Oct. 4, 1998, at B1 (discussing a two-year-old boy who died after bees stung him more than 400 times, and reporting that the child's parents relied on spiritual healing and did not seek conventional medical care); Donna Leinwand, *Colorado Parents Probed in Death of Newborn*, USA TODAY, July 24, 2000, at 3A (discussing the deaths of seven children whose parents belonged to the General Assembly Church of the First Born, which treats illness with spiritual healing); Dan McFeely, *Death Linked to Religious Beliefs*, INDIANAPOLIS NEWS, Feb. 2, 1999, at A1 (describing the death of a twelve-year-old boy who died from pneumonia after he was treated through spiritual

the 1990s, both South Dakota and Oregon repealed statutory exemptions that formerly had been available to spiritual healing believers.[9] Most recent legal scholarship is openly hostile to spiritual healing exemptions.[10]

This Essay asserts that such attacks on spiritual healing often are overbroad and insensitive to legitimate free exercise interests and parental rights. This Essay proposes that a State should intervene only where a parent's refusal to seek conventional medical treatment potentially may cause a child to suffer serious physical harm or illness.[11] Further, the State should be required to show that conventional medi-

---

healing); Mark Sauer, *Suffer the Little Children: Crusading Physician Wants Medical Intervention for Ill Youngsters Whose Fate Is Left to Spiritual Healing*, SAN DIEGO UNION-TRIB., June 22, 1999, at E1 (discussing a study by a San Diego doctor finding that of 172 deaths of children treated with spiritual healing, use of conventional medical care almost certainly would have saved the lives of at least 140 of these children).

9 *See* Mark Haberman, *Religious Freedom Shouldn't Block Children's Medical Care*, IDAHO STATESMAN, Sept. 12, 1999, at 9B (noting that Oregon lawmakers repealed the State's spiritual healing exemption in August 1999); Mark Larabee, *Faith vs. Medicine: Debating Accountability When Child's Illness Goes Untreated*, CLEV. PLAIN DEALER, Jan. 9, 1999, at 1F (noting that South Dakota repealed its spiritual healing exemption in 1990).

10 *See, e.g.*, Henry J. Abraham, *Abraham, Isaac and the State: Faith-Healing and Legal Intervention*, 27 U. RICH. L. REV. 951, 986 (1993) (stating that spiritual healing exemptions "promise a protection from liability that in practice neither protects nor accommodates anyone"); Dwyer, *supra* note 6, at 1477 (asserting that spiritual healing exemptions violate the Equal Protection Clause and involve "a naked preference for the interests of parents over the interests of children"); Ann MacLean Massie, *The Religion Clauses and Parental Health Care Decisionmaking for Children: Suggestions for a New Approach*, 21 HASTINGS CONST. L.Q. 725, 775 (1994) (arguing that spiritual healing exemptions amount "to an endorsement of the adults' religious practices, which violates the Establishment Clause of the Constitution"); Paula A. Monopoli, *Allocating the Costs of Parental Free Exercise: Striking a New Balance Between Sincere Religious Belief and a Child's Right to Medical Treatment*, 18 PEPP. L. REV. 319, 352 (1991) (concluding that legislatures should repeal spiritual healing exemptions); Janet June Anderson, Note, *Capital Punishment of Kids: When Courts Permit Parents to Act on Their Religious Beliefs at the Expense of Their Children's Lives*, 46 VAND. L. REV. 755, 777 (1993) ("In essence, courts must not interpret statutes so as to permit parents to sentence their children to death.").

11 In discussing spiritual healing cases, this Essay assumes either that the affected children are not old enough to understand the difference between spiritual healing and conventional medical care or that the affected children agree with their parents' choice of spiritual healing. These two fact patterns are typical in most spiritual healing cases involving children. *See* Dwyer, *supra* note 6, at 1465–66 (noting that in most cases, children either are incompetent to make informed treatment decisions or will agree with a parent's choice of spiritual healing). This Essay does not address the profoundly difficult questions raised where a parent wishes to rely on spiritual healing, but a child seeks treatment through conventional medical care—or vice versa.

cal treatment offers a fair probability of substantially improving the child's health. In other cases, the State should respect the free exercise rights of parents to direct the religious upbringing of their children.

Part I of this Essay examines the long tradition that authorizes parents to direct the religious upbringing of their children, including choices about spiritual healing or conventional medical treatment. Part II considers why our legal system accepts a parent's choice of spiritual healing over conventional medical treatment, even though reliance on spiritual healing may result in a child suffering injury or pain. This discussion notes that a parent's right to direct the upbringing of his or her child receives support from two longstanding American principles: the religious choice principle and the family autonomy principle.

Yet even these fundamental principles must yield when parental choices threaten the State's survival. In the long run, a State's ability to survive and flourish will be determined by the strength, ingenuity, and character of its youngest citizens. Part III concludes that for the State to preempt a parent's decision about a child's health care, the State must demonstrate that exclusive reliance on spiritual healing potentially may cause a child to suffer serious physical harm or illness. Further, the State must show that conventional medical treatment offers a fair probability of substantially improving the child's health.

Part IV evaluates arguments that spiritual healing exemptions violate the Establishment Clause[12] and the Equal Protection Clause[13] of the United States Constitution. Part IV concludes that these constitutional arguments are unconvincing.

States should adopt the approach to spiritual healing outlined in this Essay as a prudential matter. According to the Supreme Court's Free Exercise Clause[14] interpretation in *Employment Division v. Smith*,[15] the clause does not compel States to excuse religious believers from generally applicable child custody laws or criminal statutes. In *Smith*, Native American believers sought an exemption from an Oregon criminal law that prohibited the possession of peyote.[16] The believers used peyote as a sacrament in religious rituals.[17] The *Smith* Court refused to exempt the Native Americans from "an across-the-board crim-

12 U.S. CONST. amend. I.

13 U.S. CONST. amend. XIV.

14 U.S. CONST. amend. I (guaranteeing the free exercise of religion).

15 494 U.S. 872 (1990).

16 *See id.* at 874–76.

17 *See id.* at 874.

inal prohibition on a particular form of conduct."[18] Although some Supreme Court language might support a court-mandated exemption in favor of parents relying on spiritual healing,[19] *Smith* probably precludes a court-mandated exemption for parents charged with violating a generally applicable child welfare law or criminal statute.[20]

In holding that the Free Exercise Clause does not authorize courts to mandate exemptions of believers from generally applicable laws, the *Smith* Court endorsed leaving religious "accommodation to the political process."[21] Citing several state statutes that exempted the religious use of peyote from otherwise applicable criminal proscriptions, the *Smith* Court approved statutory exemptions similar to the spiritual healing statutes adopted in the vast majority of states.[22]

The prudential approach advocated in this Essay is consistent with the *Smith* Court's Free Exercise Clause interpretation. According to *Smith*, the Free Exercise Clause does not require States to adopt exemptions that immunize believers in spiritual healing from otherwise applicable child welfare laws and criminal statutes.[23] But, in cases that do not involve the potential for serious physical harm or illness, state legislators should adopt such spiritual healing exemptions.

I. PROTECTING PARENTAL CHOICE

Our society recognizes the right of parents to make lifestyle choices for their children, including religious choices. Parents decide whether their children will participate in religious rituals, whether

18 *Id.* at 884; *see also* City of Boerne v. Flores, 521 U.S. 507, 512–36 (1997) (invalidating a congressional statute adopted after the *Smith* decision, which had authorized courts to mandate religious exemptions from generally applicable state laws).

19 The *Smith* Court stated that the Free Exercise Clause might mandate exemptions where believers relied on the clause "in conjunction with other constitutional protections"—including parental rights. *Smith*, 494 U.S. at 881 & n.1 (discussing Wisconsin v. Yoder, 406 U.S. 205 (1972)). As discussed below, where parents seek to treat their children through spiritual healing, these cases involve an intersection of free exercise and parental rights. *See infra* Part II.

20 Scholars have responded to the *Smith* decision with harsh criticism. *See, e.g.*, Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 609 (1991) ("*Smith* is . . . profoundly wrong on both substantive and institutional grounds . . . ."); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990) (criticizing the *Smith* decision); *see also* David E. Steinberg, *Rejecting the Case Against the Free Exercise Exemption: A Critical Assessment*, 75 B.U. L. REV. 241, 245 (1995) (asserting that "[o]nce a legal system endorses legislative exemptions, the case against court-mandated religious exemptions loses much of its force").

21 *Smith*, 494 U.S. at 890.

22 *See id.*

23 *See id.* at 878–90.

these children will observe religious customs, and whether their children will attend secular schools or religious schools.

A parent's right to direct the upbringing of her child is protected by the United States Constitution. In *Meyer v. Nebraska*,[24] the Supreme Court invalidated a Nebraska statute, which mandated that schools could not teach any foreign language. In holding that the Nebraska law violated the Due Process Clause of the Fourteenth Amendment,[25] the *Meyer* Court asserted that this prohibition unconstitutionally interfered with "the natural duty of the parent to give his children education suitable to their station in life."[26]

In *Pierce v. Society of Sisters*,[27] the Supreme Court reviewed an Oregon statute that required parents to send children between eight-years-old and sixteen-years-old to a public school. The statute did not allow parents to choose private schools.[28] Again relying on the Fourteenth Amendment, the Court invalidated the Oregon statute.[29] The *Pierce* Court asserted that the statute "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[30] In a broad endorsement of parental rights, the *Pierce* Court continued: "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[31]

A parent's right to determine the religious upbringing of his or her children was recognized in *Wisconsin v. Yoder*.[32] In *Yoder*, Amish parents refused to send their children to high school.[33] The State of Wisconsin alleged that the parents had violated a state law that required compulsory high school attendance.[34] The State brought a successful criminal prosecution against the parents.[35]

The *Yoder* Court held that the State must exempt the Amish from the compulsory school attendance law.[36] The *Yoder* Court read the earlier *Pierce* decision as "a charter of the rights of parents to direct

24 262 U.S. 390 (1923).
25 U.S. CONST. amend. XIV
26 *Meyer*, 262 U.S. at 400.
27 268 U.S. 510 (1925).
28 *See id.* at 530–31.
29 *See id.* at 530–36.
30 *Id.* at 534–35.
31 *Id.* at 535.
32 406 U.S. 205 (1972).
33 *See id.* at 207.
34 *See id.*
35 *See id.* at 208–13.
36 *See id.* at 234–36.

the religious upbringing of their children."[37] The *Yoder* majority concluded: "This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[38]

If a parent decides to treat his or her child's illness through spiritual healing, such a choice seems to involve a finality not associated with many other parental decisions. Upon becoming an adult, a child may reject a parent's religious tradition and choose a different religion or no religion at all. However, if a child suffers a permanent injury or death because a parent chooses spiritual healing over conventional medical treatment, this harm cannot be undone.[39]

However, the *Yoder* case involved a similar sort of finality. In an argument accepted by the *Yoder* majority, the Amish asserted that the values of "self-distinction, competitiveness, worldly success, and social life with other students" instilled by high school attendance would reduce the likelihood that Amish teenagers successfully could remain in the Amish community.[40] At the same time, exempting the Amish students from high school would erect a formidable barrier to any possibility that the students ultimately could succeed outside of the Amish community.[41]

The *Yoder* decision thus involved a finality not dissimilar from decisions about the medical treatment received by a child. If the *Yoder* Court ruled in favor of the State, the Amish students would receive a high school education, but the students might become estranged from the Amish community. If the Court ruled in favor of the parents, the Amish students would remain in the Amish community and would lack the skills and experiences necessary to succeed outside of Amish society. The Court ultimately ruled in favor of the Amish parents, who believed that their children should remain in the Amish community.[42]

---

37 *Id.* at 233.

38 *Id.* at 232.

39 *See, e.g.*, Massie, *supra* note 10, at 770–71 (asserting that a parent's decision to rely on spiritual healing may have permanent adverse consequences for his or her children).

40 *Yoder*, 406 U.S. at 211; *see also id.* at 218 (explaining that compulsory high school attendance would substantially interfere "with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development").

41 In his dissenting opinion, Justice William O. Douglas recognized the finality of the *Yoder* decision. *See id.* at 245 (Douglas, J., dissenting) ("If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today.").

42 *See id.* at 234–36.

However, the *Yoder* majority was careful to note that the exemption of Amish students would have a limited impact on the state interest in universal education.[43] Because the Amish accepted formal schooling until their children reached high school, Wisconsin only sought to require "an additional one or two years of formal high school."[44] The *Yoder* Court conceded that public education "ranks at the very apex of the function of a State"[45] and strongly suggested that the result might be different if the Amish had asked the Court to approve a more significant interference with this state interest.[46] In cases where a parent's decisions seriously threatened "the physical or mental health of the child,"[47] the state interest in protecting a child's health might outweigh claims of religious liberty and parental rights.

No Supreme Court case has held that the Free Exercise Clause protects the right of parents to treat their children through spiritual healing.[48] State courts consistently have held that the Free Exercise Clause does not prevent States from intervening when parents reject conventional medical care for their children.[49]

However, more than forty states have enacted statutes that protect a parent's right to rely on spiritual healing.[50] Such statutes provide parents who rely on spiritual healing with a defense to some types of criminal prosecution. Also, these statutes provide that the State typically cannot use a parent's reliance on spiritual healing against the parent in a child custody proceeding.

---

43 *See id.* at 222–34.

44 *Id.* at 222.

45 *Id.* at 213.

46 *See id.* at 234–36.

47 *Id.* at 230.

48 With the decision in *Smith*, 494 U.S. 872 (1990), the Justices raised serious doubts about whether the Court would find that a parent's right to treat his or her child with spiritual healing is protected by the Free Exercise Clause. *See supra* text accompanying notes 15–23 (discussing the *Smith* decision).

49 *See, e.g.*, Walker v. Superior Court, 763 P.2d 852, 869–71 (Cal. 1988) (holding that the State could prosecute a parent for felony child endangerment and involuntary manslaughter where a child died of meningitis after receiving treatment through prayer); *In re* Hamilton, 657 S.W.2d 425, 429 (Tenn. Ct. App. 1983) (holding that the Free Exercise Clause did not prevent the State from ordering that a child must receive conventional medical treatment, where the child suffered from a highly aggressive form of cancer that required immediate treatment); State v. Norman, 808 P.2d 1159, 1163 (Wash. Ct. App. 1991) (holding that the Free Exercise Clause did not bar a first-degree manslaughter conviction, where a child treated with spiritual healing died of diabetes).

50 *See* Dwyer, *supra* note 6, at 1354 (stating that forty-six states have adopted spiritual healing exemptions); Rosato, *supra* note 4, at 51–57 nn.41–74 (citing spiritual healing exemptions adopted in forty-six states).

The California statutory scheme is typical. A California statute provides that the State typically cannot charge a parent with misdemeanor child abuse where "a parent provides a minor with treatment by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination."[51] In addition, the State cannot typically use spiritual healing as the basis for an adverse child custody determination.[52]

Nonetheless, in spiritual healing cases, the California legislature has provided that the State may take custody of the child "to protect the child from suffering serious physical harm or illness."[53] Similarly, where the use of spiritual healing rather than conventional medical care has caused a child to suffer serious physical harm, the statutory exemption will not immunize a parent from felony child endangerment charges.[54] And where the State is able to prove that a child has died because the child's parents relied exclusively on spiritual healing, the State may charge the parents with homicide.[55]

Some States provide parents who rely on spiritual healing with broader protection than the California statutory scheme. For example, a West Virginia statute explicitly provides that reliance on spiritual healing immunizes a parent from murder charges.[56] And in *Hermanson v. State*,[57] the Florida Supreme Court held that a more ambiguous Florida statute also precluded a murder prosecution against

---

51 CAL. PENAL CODE § 270 (West 1999).

52 *See* Cal. WELF. & INST. CODE § 300(b) (West Supp. 2000).

53 *Id.*

54 *See Walker*, 763 P.2d at 866.

55 *See id.* In a number of other states, spiritual healing exemptions follow the California approach. *See, e.g.*, OKLA. STAT. ANN. tit. 21, § 852(c) (West Supp. 2000) (exempting parents who rely on spiritual healing from child endangerment prosecutions, "provided that medical care shall be provided where permanent physical damage could result to such child"); *In re* D.L.E., 645 P.2d 271, 276 (Colo. 1982) (stating that a Colorado statutory exemption for parents who rely on spiritual healing did not apply where "a minor suffers from a life-threatening medical condition"); Hall v. State, 493 N.E.2d 433, 435 (Ind. 1986) (stating that although an Indiana statute exempted parents who rely on spiritual healing from child neglect prosecutions, the exemption did not apply in a reckless homicide case); *see also* Daniel J. Kearney, Comment, *Parental Failure to Provide Child With Medical Assistance Based on Religious Beliefs Causing Child's Death—Voluntary Manslaughter in Pennsylvania*, 90 DICK. L. REV. 861, 885 (1986) (noting that under Pennsylvania law, parents "may treat their children according to spiritual healing practices so long as the children's lives are not endangered").

56 *See* W. VA. CODE § 61-8D-2(d) (1997).

57 604 So. 2d 775 (Fla. 1992).

parents who had relied exclusively on spiritual healing to treat their child.[58]

II. The Intersection of Religious and Family Traditions

As the preceding Part demonstrates, a parent's right to direct the religious upbringing of his or her child is constitutionally protected. And in the vast majority of states, statutes explicitly protect a parent's right to treat his or her children with spiritual healing, rather than conventional medical treatment.[59]

But the cases and statutes cited in Part I of this Essay only beg the question of why our legal system allows parents to treat their children with spiritual healing and to forego conventional medical treatment. Why do States allow parents to rely on spiritual healing when the decision to reject conventional medical treatment may cause a child to suffer unnecessary pain and, in some cases, even may result in a child's death?

Cases involving spiritual healing and children involve an intersection of two powerful traditions. The religious choice principle limits the State's ability to intervene on questions of religious doctrine.[60] The family autonomy principle recognizes the essential role played by the family in the liberal state.[61] The following two Sections examine each of these traditions.

A. The Religious Choice Principle

According to the Supreme Court, the Religion Clauses of the First Amendment[62] mandate government "neutrality" with respect to religious beliefs. For example, in *Epperson v. Arkansas*,[63] the Court invalidated an Arkansas law that prohibited public school instructors

58 *See id.* at 776. A Florida statute provided that spiritual healing could not be a basis for a finding of child abuse in a civil child custody case. *See* FLA. STAT. ANN. § 415.503(f) (West 1998). In *Hermanson*, the State argued that this exemption provided spiritual healing practitioners with a defense only in child custody cases and that the exemption did not apply in criminal cases. *Hermanson*, 604 So. 2d at 781–82. The Florida Supreme Court held that the prosecution of the *Hermanson* defendants violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *See id.* at 776. The *Hermanson* court concluded that "the legislature has failed to clearly indicate the point at which a parent's reliance on his or her religious beliefs in the treatment of his or her children becomes criminal conduct." *Id.* at 782.

59 *See supra* note 6 and accompanying text.

60 *See infra* Part II.A.

61 *See infra* Part II.B.

62 U.S. CONST. amend. I.

63 393 U.S. 97, 103 (1968).

from teaching the evolutionary account of man's origins. The *Epperson* Court asserted that this decision assured government neutrality with respect to different religions.[64] The Justices wrote that Government "may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another."[65]

But in his book *Foreordained Failure*,[66] Professor Steven D. Smith recognizes that the Court's claim of neutrality cannot be squared with Court decisions. As Professor Smith accurately observes: "Indeed, it would not be much of an overstatement to say that modern legal discourse about religious freedom consists of judges and legal scholars unblushingly proclaiming their 'neutrality' even as they reject both the premises and the conclusions of their adversaries."[67] In its resounding rejection of the fundamentalist claim that public schools must teach the creationist account of man's origins, the *Epperson* decision itself was not neutral.[68]

Further, an interpretation that sought to achieve neutrality between religion and non-religion would clash with the history of the First Amendment. Members of new evangelical religions, such as the Baptists and the Quakers, were some of the most vocal proponents of the First Amendment religion clauses.[69] Given their own fervent beliefs on the importance of religious exercise, the argument that these activists sought only to assure state neutrality with respect to religion is not plausible.

As I have argued elsewhere, a more plausible historical account would read the First Amendment as mandating the principle of religious choice.[70] The religious choice principle captures a transformation in the American approach to religious dissenters, which occurred around the time of the Revolutionary War. Prior to the American

64 *See id.* at 104.

65 *Id.*

66 STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM (1995).

67 *Id.* at 78.

68 *See id.* at 84 (asserting that in *Epperson*, the Court "had rejected in advance the fundamentalist position and background beliefs, with their emphasis on biblical literalism as the avenue to truth").

69 *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1437 (1990) ("To determine the meaning of the religion clauses, it is necessary to see them through the eyes of their proponents, most of whom were members of the most fervent and evangelical denominations in the nation.").

70 *See* David E. Steinberg, *Gardening at Night: Religion and Choice*, 74 NOTRE DAME L. REV. 987, 1023 (1999) (book review).

Revolution, the established Congregational and Anglican churches attempted to stamp out the newer evangelical religions through fines, imprisonment, banishment from a colony, and even executions.[71]

But at about the time of the Revolutionary War, Americans renounced the colonial practice of proscribing religious sects and punishing their adherents.[72] By the time of the Constitutional Convention in 1789, most Americans agreed on the principle of religious choice, which was embodied in the Religion Clauses of the First Amendment.[73]

The writings of philosopher John Locke and statesman James Madison both explicitly endorsed the religious choice principle. In *A Letter Concerning Toleration*,[74] Locke wrote that the "liberty of conscience is every man's natural right, equally belonging to dissenters," and that "nobody ought to be compelled in matters of religion either by law or force."[75]

James Madison's famous *Memorial and Remonstrance Against Religious Assessments*[76] remains one of the most eloquent expressions of the religious choice principle. Madison wrote: "The Religion then of every man must be left to the conviction and conscience of every man."[77] Madison continued: "Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us."[78]

Although discussions of "neutrality" have dominated Supreme Court decisions, rhetoric proscribing state interference in private re-

---

71 *See id.* at 1021–22 (summarizing the punishment of religious dissenters in colonial America).

72 *See, e.g.*, GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 55 (1987) (noting that by 1789, "[d]irect compelled subvention of a sect other than one's own was an idea whose time had passed"); THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 219 (1986) (stating that by 1789, "citizens had a right to practice the religions of their choice, even the hated Catholicism, which had been proscribed in colonial America").

73 *See* Steinberg, *supra* note 70, at 1015–23 (describing the historical origins of the religious choice principle).

74 6 JOHN LOCKE, *A Letter Concerning Toleration*, *in* THE WORKS OF JOHN LOCKE 5 (Scientia Press, new ed. 1963) (1812).

75 *Id.* at 47–48.

76 2 JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, *in* THE WRITINGS OF JAMES MADISON 183 (Gaillard Hunt ed., 1901).

77 *Id.* at 184.

78 *Id.* at 186.

ligious choices has found its way into Court opinions.[79] As early as 1963, the Court described the Free Exercise Clause as protecting "the right of every person to freely choose his own course" with respect to religious observance.[80] In *Mueller v. Allen*,[81] the Court upheld a state tax deduction for tuition payments at sectarian and other private schools, because "public funds become available only as a result of numerous private choices of individual parents of school-age children."[82] And this past summer, the Court upheld a private school aid program, because sectarian schools received the aid only as a result of a parents' "private choices."[83]

Madison's non-judgmental approach in his *Memorial and Remonstrance* is particularly appropriate with respect to medical treatment choices. Despite extraordinary advances in medical diagnosis and treatment, conventional medical science still lacks answers to a number of fundamental questions.

Although doctors often may identify genetic or environmental factors that predispose individuals to develop certain diseases, medical scientists often cannot definitively explain why some people fall ill and others do not. Preventive treatments that typically are safe and produce laudatory results sometimes cause disastrous side effects. For example, although the vaccine for whooping cough saves more than 400 lives each year, in rare cases the vaccine causes serious brain damage.[84] Medical science lacks effective treatments and cures for a number of debilitating and deadly diseases—such as aggressive forms of cancer, Alzheimer's disease, and multiple sclerosis.

Given these serious limitations of medical science and the religious choice principle of the Free Exercise Clause, lawmakers should not categorically preclude spiritual healing as an alternative. In particular, the State should not discount the psychic strength and com-

---

79 One of the most emphatic statements of this religious choice principle is the quoted passage from *Yoder* that appears at the outset of this Essay. *See* Wisconsin v. Yoder, 406 U.S. 205, 223–24 (1972).

80 Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963).

81 463 U.S. 388 (1983).

82 *Id.* at 399.

83 Mitchell v. Helms, 120 S. Ct. 2530, 2541 (2000).

84 *See* Andrew R. Klein, *Rethinking Medical Monitoring*, 64 BROOK. L. REV. 1, 28 (1998); *see also* Patricia C. Kuszler, *Balancing the Barriers: Exploiting and Creating Incentives to Promote Development of New Tuberculosis Treatments*, 71 WASH. L. REV. 919, 962–63 (1996) (explaining that some patients injected with the swine flu vaccine developed Guillain-Barre Syndrome, a dangerous paralysis that may result in death or permanent disability); Charles J. Walsh et al., *The Learned Intermediary Doctrine: The Correct Prescription for Drug Labeling*, 48 RUTGERS L. REV. 821, 851 (1996) (noting the Sabin polio vaccine sometimes will cause vaccine-induced polio).

fort provided by spiritual healing in cases where doctors have determined that a patient's condition is untreatable and terminal.[85]

B. The Family Autonomy Principle

Two characteristics of the liberal state are an emphasis on individualism and a refusal to entertain questions of morality. By emphasizing individualism, the liberal State encourages effort and achievement.[86] The liberal State rewards individuals based on their personal accomplishments and refuses to reward those who do not strive for success. The liberal State also rewards creativity. While radical proposals are risky and may never pay off, such proposals also hold the promise of the greatest possible rewards. At least in theory, a person's success in the liberal state is limited only by his drive and imagination.

The refusal of the liberal state to entertain questions of morality also is consistent with a society that seeks to maximize individual accomplishments.[87] If the State takes any position on the "ultimate" questions of morality and virtue, the State will exclude those individuals with differing views. The heretics will drop out of society and will

---

85 *See* Anne D. Lederman, Note, *Understanding Faith: When Religious Parents Decline Conventional Medical Treatment for Their Children*, 45 CASE W. RES. L. REV. 891, 912 (1995) (stating that if religion sustains hope as believers face death, "its value is immeasurable").

86 *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM 190 (1993) (explaining that critics often assert that liberalism is "arbitrarily biased in favor of one or another form of individualism"); Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 976 (1993) ("In political terms, the liberal individual stands alone."); James W. Torke, *What Price Belonging: An Essay on Groups, Community, and the Constitution*, 24 IND. L. REV. 1, 10 (1990) (explaining that, in liberal philosophy, "the primary social unit is the self-interested, self-defining person who pre-exists, philosophically as well as ethically, society").

87 For assertions that government should not entertain questions of morality, see Bellotti v. Baird, 443 U.S. 622, 638 (1979) (plurality opinion) ("[A]ffirmative sponsorship of particular ethical, religious, or political beliefs is something we expect the State *not* to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice."); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that the Government cannot "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion"); *see also* Stephen L. Carter, *The Separation of Church and Self*, 46 SMU L. REV. 585, 588 (1992) (noting that, although liberals assert "that it is wrong for the state to impose anybody's morality on anybody else," no one actually believes this); Stephen A. Gardbaum, *Why the Liberal State Can Promote Moral Ideals After All*, 104 HARV. L. REV. 1350, 1351 (1991) (stating that contemporary characterizations of liberalism focus on "the neutrality of the state toward moral ideas").

no longer strive for contributions to the public good.[88] And if the State takes a position on a sensitive moral subject where views differ significantly, the state position may result in open conflict. The disruption caused by such a conflict will impede individual accomplishments and social progress. The danger of state involvement on questions of morality is reflected in the Supreme Court's "political divisiveness" concern, invoked when the Justices have reviewed church-state relationships.[89]

As a result of this emphasis on individualism and de-emphasis on questions of morality, the liberal state sometimes appears as a cold, impersonal regime.[90] With the emphasis on individualism in the liberal state, personal relationships often suffer. As individuals seek to better their lives by taking new jobs in distant cities, communities deteriorate.[91]

In isolation, the liberal State does not provide individuals with either the moral guidance or the personal connections necessary for those individuals to live complete and happy lives—a condition necessary for individual productivity. The liberal State relies on intermedi-

88 *Cf.* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 196 (2d ed. 1998) (asserting that in modern democratic societies, "bracketing our moral and religious convictions is necessary if we are to secure social cooperation on the basis of mutual respect").

89 *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 622 (1971) (holding state laws that partially funded the salaries of teachers in sectarian private elementary and secondary schools violated the Establishment Clause, in part because of "the divisive political potential of these state programs"); *see also* Larson v. Valente, 456 U.S. 228, 252–53 (1982) (relying in part on the political divisiveness concern to invalidate a Minnesota law, which required that only some proselytizing religions must report contributions); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 797 (1973) (invalidating sectarian school aid programs, because such programs might generate "divisive political consequences"). *But see* David E. Steinberg, *Alternatives to Entanglement*, 80 KY. L.J. 691, 714–23 (1991–92) (criticizing the political divisiveness doctrine, because the doctrine contradicts First Amendment principles protecting religious speech and proscribing religious discrimination).

90 *See* BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE 68 (1984); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-20, at 1418 (2d ed. 1988) (stating that liberal individualism results in "alienation," with citizens "isolated and made vulnerable"); Robert A. Baruch Bush, *Between Two Worlds: The Shift From Individual to Group Responsibility in the Law of Causation of Injury*, 33 UCLA L. REV. 1473, 1534 (1986) (asserting that in the liberal state, "the self that remains is a truncated, impoverished self").

91 *See* Torke, *supra* note 86, at 16–17 (stating that in the liberal state, "[i]ndividual freedom is purchased largely by the unshackling of the person from those institutions that largely governed, but also informed, the person's life—kin, church, guild, locality, fealty, and class").

ate institutions to fill these gaps.[92] The family may be the most important of these institutions.[93]

In the American liberal state, the family has fulfilled a variety of critical functions. First, the family is the primary source for interpersonal relationships. In a society that places little emphasis on personal connections and shared tradition, the family provides the individual with emotional support, interdependence, and a place in the world.[94]

Second, the family is the principal force that shapes the child into an effective citizen.[95] The liberal State requires that citizens must maintain an attitude of tolerance toward others with differing views.[96] However, such tolerance is likely only if an individual is capable of love and mutual respect. As Professor Anne C. Dailey writes, "[P]arents are understood to be ideally situated to provide the environmental conditions necessary for successful psychological differenti-

92 *See* Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479, 487 (1989) ("It is now a familiar idea in political as well as social theory that people need communities, and that social life is both natural and essential for human beings."); Marie A. Failinger, *Equality Versus the Right to Choose Associates: A Critique of Hannah Arendt's View of the Supreme Court's Dilemma*, 49 U. PITT. L. REV. 143, 151–52 (1987) (discussing the Supreme Court's suggestion that "private associations, in particular, may have intrinsic value, because they allow people emotional expression, the ability to share what is intimate, not only thoughts but experiences and daily life").

93 *See* Bellotti v. Baird, 443 U.S. 622, 638 (1979) (plurality opinion) ("[T]he tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter.").

94 *See* CHRISTOPHER LASCH, HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED 5 (1977) (describing a traditional view of the family "as a refuge from the highly competitive and often brutal world of commerce and industry"); TRIBE, *supra* note 90, § 15-20, at 1418 (stating that the liberal State should facilitate "the emergence of relationships that meet the human need for closeness, trust, and love"); Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 892 (1984) ("It is within the family that parents provide for the child's security and intimacy, conditions necessary for each child's physical, emotional, and moral development.").

95 *See* Wisconsin v. Yoder, 406 U.S. 205, 233 (1972) (holding that parental duties include "the inculcation of moral standards, religious beliefs, and elements of good citizenship"); MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 8 (1985) ("Though other institutions such as the common school and the church shared its duties, molding the nation's young into virtuous republicans and competent burghers became more clearly the primary responsibility of the family.").

96 *See* Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1835 (1995) ("[W]hat liberalism requires of its citizens is a tolerant disposition, rational habits of thought, and a willingness to engage in political discourse, what we may refer to as 'civic character.'").

ation; the virtues of love, trust and empathy are commonly considered beyond the capacity of state institutions to provide."[97]

Finally, families help to preserve the liberal state by insuring pluralism and a diversity of opinion. The family and other intermediate institutions constitute an important component in a system of checks and balances.

From the early years of the republic, American political theory has sought to check the development of powerful factions that might seek to replace the tolerance of the liberal state with a required orthodoxy.[98] Families and other diverse intermediate institutions have helped to prevent the formation of powerful and intolerant factions. Professor David J. Herring writes: "[T]he family, through the production of numerous diverse citizens, promotes social diversity and checks factious behavior as expressed through the authority of the majoritarian state."[99]

Opponents of spiritual healing exemptions would not permit spiritual healing believers to make health care decisions for their children. However, these critics are profoundly silent about who should make these health care decisions.

A child may become ill at any time. If the State completely prevented spiritual healing believers from making health care decisions for their children, only two possibilities seem plausible. The State might conclude that spiritual healing believers could not exercise custody over their children. Instead, another couple or the State would raise the children. Alternatively, spiritual healing believers would retain custody of their children, but the State would monitor the parents' health care decisions on an almost constant basis. The radical nature of both proposals is obvious.

Perhaps opponents of the state spiritual healing exemptions would not divest spiritual healing believers of all authority for their children's health care. Perhaps these critics believe that the State should intervene only when the failure to provide conventional medical care will cause a child to suffer some serious injury. As discussed in

97 *Id.* at 1853; *see also* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 74 (1991) ("A large collection of self-determining, self-sufficient individuals cannot even be a society.").

98 *See* THE FEDERALIST No. 10 (James Madison); *see also* David J. Herring, *Rearranging the Family: Diversity, Pluralism, Social Tolerance and Child Custody Disputes*, 5 S. CAL. INTERDISC. L.J. 205, 212–15 (1997) (discussing how families and other intermediate institutions preserve the pluralism sought by James Madison and other early American statesmen).

99 Herring, *supra* note 98, at 215.

Part III, most state spiritual healing exemptions already allow state intervention in such circumstances.

III. LIMITS ON PARENTAL CHOICE: THE STATE'S RIGHT TO SURVIVAL

For all entities, the preeminent right is the right to survival. So it is for the State. In the long run, the State's ability to survive will be determined by the strength, ingenuity, and character of the State's youngest citizens. The State possesses a preeminent interest in protecting children from serious and irreversible harm, which would prevent these children from ultimately becoming productive citizens in a democracy.[100]

The State's preeminent interest in insuring that children will be capable participants in a democracy is recognized in a number of familiar laws. Child abuse laws allow the State to take a child away from the child's biological parent in situations where continued residency in a parent's home may result in serious harm to the child.[101] Laws requiring compulsory school attendance also help to insure that a child is able to participate in a democracy.[102]

When faced with Free Exercise Clause challenges, the Supreme Court has recognized the State's preeminent right to protect children from serious and irreversible harm. In *Prince v. Massachusetts*,[103] Sarah Prince was a member of the Jehovah's Witnesses religion. Prince also was the custodian and aunt of Betty M. Simmons, a nine-year-old girl.[104] On the evening of December 18, 1941, Simmons accompanied Prince and helped Prince sell religious publications.[105] As a re-

100 *See* Ginsberg v. New York, 390 U.S. 629, 640 (1968) (noting that the State "has an independent interest in the well-being of its youth").

101 *See, e.g.*, Carolyn Wilkes Kaas, *Breaking Up a Family or Putting It Back Together Again: Refining the Preference in Favor of the Parent in Third-Party Custody Cases*, 37 WM. & MARY L. REV. 1045, 1087 (1996) ("In abuse and neglect cases, the Constitution . . . requires courts to balance carefully the need to protect children with the strong obligation to protect family autonomy."); Laura Sack, *Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases*, 4 YALE J.L. & FEMINISM 291, 322 (1992) ("In the context of parental neglect, states typically remove children from their parents' custody only where there is evidence of child neglect or abuse by the parents.").

102 *See* Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) ("There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education.").

103 321 U.S. 158, 161 (1944).

104 *See id.* at 159.

105 *See id.* at 162–63.

sult of these activities, a state court convicted Prince of violating Massachusetts child labor laws.[106]

In affirming Sarah Prince's conviction, the Supreme Court held that enforcement of the state child labor laws had not violated Prince's Free Exercise Clause right to direct the religious upbringing of Betty Simmons.[107] In recognizing the State's preeminent right to survival, the *Prince* Court wrote: "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."[108] Given the "crippling effects of child employment,"[109] Massachusetts could enforce its child labor laws by prosecuting Prince.[110]

With respect to spiritual healing, state statutory exemptions also recognize the State's right to survival. For example, a California statute provides that the State cannot prosecute a parent for the misdemeanor of child endangerment, where the parent has treated a child's illness through spiritual healing.[111] But in *Walker v. Superior Court*,[112] the California Supreme Court concluded that this exemption from misdemeanor child abuse charges did not prevent the State from bringing felony child endangerment and involuntary manslaughter charges against a parent.

Defendant Laurie Girouard Walker was a member of the Christian Science Church.[113] When Walker's four-year-old daughter Shauntay fell ill with flu-like symptoms and a stiff neck, Walker and other Christian Science Church members treated Shauntay with prayer.[114] Although Shauntay's condition progressively worsened, Walker did not seek conventional medical treatment for Shauntay.[115] Seventeen days after she originally fell ill, Shauntay Walker died of acute meningitis.[116]

---

106 *See id.* at 159, 163.

107 *See id.* at 165–71.

108 *Id.* at 168.

109 *Id.*

110 *See id.* at 168–71; *see also* Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905) (upholding the defendant's conviction for violating a compulsory smallpox vaccination law, because an individual's rights "under the pressure of great dangers, [may] be subjected to such restraint . . . as the safety of the general public may demand").

111 *See* CAL. PENAL CODE § 270 (West 1999).

112 763 P.2d 852, 853 (Cal. 1988).

113 *See id.* at 855.

114 *See id.*

115 *See id.*

116 *See id.*

Under these circumstances, the California Supreme Court held that the State could bring felony criminal charges against Walker.[117] The court noted that in child custody proceedings, treatment of a child through spiritual healing usually is not a basis for depriving a parent of custody.[118] But even in spiritual healing cases, a court could deprive a parent of custody where "necessary to protect the child from suffering serious physical harm or illness."[119] The *Walker* court concluded: "The expression of legislative intent is clear: when a child's health is seriously jeopardized, the right of a parent to rely exclusively on prayer must yield."[120]

In allowing the State to intervene in cases of "serious physical harm or illness," the California law interpreted in *Walker* appears to have struck the appropriate balance between a parent's right to guide the religious upbringing of her children and the State's interest in insuring its own survival.[121] But in addition, the State should be able to compel the use of conventional medical treatment only when medical treatment offers a fair probability of substantially improving a child's health.

In *Newmark v. Williams*,[122] three-year-old Colin Newmark was stricken with an aggressive and deadly form of pediatric cancer. Colin's parents were Christian Scientists, who proposed to treat Colin with spiritual healing.[123] The Delaware Child Protective Services

---

117 *See id.* at 873.

118 *See id.* at 856–58.

119 CAL. WELF. & INST. CODE § 300(b) (West Supp. 2000).

120 *Walker*, 763 P.2d at 866. The *Walker* court also rejected a defense argument based on the Free Exercise Clause of the First Amendment to the United States Constitution. *See id.* at 869–71. According to defense counsel, the clause required that the State must exempt Walker from the felony child endangerment and involuntary manslaughter charges. *See id.* However, the *Walker* court concluded that the state interests in protecting children from serious injury outweighed any Free Exercise Clause interest. *See id.* The court noted that a state will survive only if children mature into healthy, well-rounded citizens. *See id.* at 869. The *Walker* court concluded that this state interest was "of unparalleled significance." *Id.*

121 *See* Barry Nobel, *Religious Healing in the Courts: The Liberties and Liabilities of Patients, Parents, and Healers*, 16 U. PUGET SOUND L. REV. 599, 668 (1993) (arguing that although spiritual healing exemptions allow courts to order lifesaving treatment for children, "courts should refrain from interfering with a family's integrity and religious liberty in most other instances"); Rosato, *supra* note 4, at 117–18 (asserting that spiritual healing exemptions should not apply to parents, where "serious bodily harm or death" could result).

122 588 A.2d 1108 (Del. 1991).

123 *See id.* at 1109–11.

Agency sought to obtain temporary custody of Colin for the purpose of treating the child with chemotherapy.[124]

The Delaware Supreme Court denied the State's petition and ruled in favor of the parents.[125] The State's medical expert admitted that the chemotherapy treatment proposed by the State involved a number of terrible side effects and that the treatment itself might kill Colin Newmark.[126] Even if the treatment did not kill Colin, the State's medical expert estimated that after these highly invasive medical procedures, Colin would have "at best" a forty percent chance of surviving his cancer.[127]

Based on this record, the Delaware Supreme Court concluded that the State had not met the "heavy burden" that would justify state intervention in the parent-child relationship.[128] In concluding that Colin's best interests were served by permitting his parents to retain custody and rely on spiritual healing, the *Newmark* court wrote: "Parents must have the right at some point to reject medical treatment for their child."[129]

IV. The Unconvincing Constitutional Challenges to Spiritual Healing Exemptions

Most opponents of state spiritual healing exemptions simply argue that such statutes underestimate the importance of caring for children with conventional medical treatment.[130] However, two scholars have developed more sophisticated arguments in opposition to state spiritual healing exemptions. According to Professor Ann MacLean Massie, the exemption statutes violate the Establishment Clause of the First Amendment.[131] Professor James G. Dwyer contends that the exemption statutes violate the Equal Protection Clause

124 *See id.* at 1109–10.

125 *See id.* at 1120–21.

126 *See id.* at 1119.

127 *See id.*

128 *See id.* at 1110.

129 *Id.* at 1120.

130 *See, e.g.*, Ivy B. Dodes, Note, *"Suffer the Little Children": Toward a Judicial Recognition of a Duty of Reasonable Care Owed Children by Religious Faith Healers*, 16 Hofstra L. Rev. 165, 183 (1987) ("The judicial system has recognized the grave danger to children which could ensue if defendant churches are permitted to opt out of a statutory system designed to protect children . . . ."); Laura M. Plastine, Comment, *"In God We Trust": When Parents Refuse Medical Treatment for Their Children Based upon Their Sincere Religious Beliefs*, 3 Seton Hall Const. L.J. 123, 160 (1993) ("[T]he life of a child is paramount and necessarily trumps all other rights.").

131 *See* Massie, *supra* note 10, at 775.

of the Fourteenth Amendment.[132] Although these scholars' arguments are carefully constructed and ably presented, the arguments ultimately are not convincing.

A. Professor Massie's Establishment Clause Challenge

In a 1994 article, Professor Ann MacLean Massie contends that statutes exempting spiritual healing believers from child abuse proscriptions and other legal obligations violate the Establishment Clause of the First Amendment to the United States Constitution.[133] Professor Massie writes that such statutes amount to an unconstitutional "endorsement of the adults' religious practices."[134] According to Professor Massie, these statutes "impermissibly allow parents to impose their own religious beliefs and practices upon their minor children."[135]

The Court never has endorsed a categorical rule that all statutory religious exemptions violate the Establishment Clause. Admittedly, the Justices have invalidated some statutory religious exemptions on Establishment Clause grounds.[136] But in a number of statutory exemption cases, the Court has rejected Establishment Clause attacks. As Professor Massie recognizes,[137] the Court has upheld laws that exempted churches from property taxes,[138] that exempted religious employers from a federal employment discrimination mandate,[139] and that excused conscientious objectors from compulsory military service.[140] And in *Smith*,[141] the Court approved of leaving religious ac-

132 *See* Dwyer, *supra* note 6, at 1326–27, 1463–65.

133 *See* Massie, *supra* note 10, at 775. The First Amendment prohibits any law "respecting an establishment of religion." U.S. CONST. amend. I.

134 Massie, *supra* note 10, at 775.

135 *Id.* at 731.

136 *See, e.g.*, Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 25 (1989) (plurality opinion) (invalidating a Texas ordinance that exempted religious books and periodicals from a state sales and use tax); Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 708–11 (1985) (invalidating a Connecticut statute that prohibited an employer from requiring that employees must work on their Sabbath).

137 *See* Massie, *supra* note 10, at 761.

138 *See* Walz v. Tax Comm'n, 397 U.S. 664, 680 (1970) (upholding a state statute which exempted property used for religious purposes from property taxes).

139 *See* Corp. of the Presiding Bishop v. Amos, 483 U.S. 327, 334–40 (1987) (upholding a federal statute that exempted religious employers from a federal law prohibiting religious discrimination in employment).

140 *See* Welsh v. United States, 398 U.S. 333, 338–44 (1970) (plurality opinion) (upholding a federal statute that exempted conscientious objectors from compulsory military service).

141 494 U.S. 872 (1990).

commodation "to the political process,"[142] favorably citing state statutes that exempted religious believers from peyote proscriptions.[143]

Although some commentators have advocated Establishment Clause interpretations that would proscribe all statutory exemptions,[144] such interpretations are difficult to square with historical evidence. In the late eighteenth century, American legislators were quite willing to adopt statutory exemptions. For example, the Continental Congress exempted religious objectors from compulsory military service.[145] Early state legislatures also enacted religious exemptions from testimonial oaths and from state-collected religious assessments.[146] To the extent that they consider historical evidence relevant, opponents of statutory religious exemptions would need to argue that the lawmakers who enacted these exemption statutes wished to proscribe the very same exemptions when they adopted the Establishment Clause of the First Amendment. No historical evidence supports this conclusion.

Professor Massie does not seem to believe that all statutory exemptions violate the Establishment Clause.[147] Professor Massie also acknowledges that "parents have the right to inculcate their own religious views in their children."[148] However, Professor Massie opposes statutory exemptions for parents who treat their children through spiritual healing, because the parents' "religious practices . . . may have extremely debilitating effects upon their [children's] lives and health that cannot be undone or overcome when the children reach maturity and can make their own religious choices."[149]

Professor Massie's argument reveals her antipathy toward believers who practice spiritual healing. In contexts other than spiritual

142 *Id.* at 890.

143 *See id.*

144 *See, e.g.*, Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 5–6 (1961) (arguing that the Religion Clauses prohibit any government "classification in terms of religion either to confer a benefit or to impose a burden"); Mark Tushnet, *"Of Church and State and the Supreme Court": Kurland Revisited*, 1989 SUP. CT. REV. 373, 400–02 (endorsing Professor Kurland's approach); *see also* Lupu, *supra* note 20, at 600–09 (arguing that courts should be able to mandate religious exemptions, but that legislatures usually should not be able to adopt statutory religious exemptions).

145 *See* 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 189 (Worthington C. Ford ed., 1905).

146 *See* McConnell, *supra* note 69, at 1467–71.

147 *See* Massie, *supra* note 10, at 747–60.

148 *Id.* at 770.

149 *Id.* at 752.

healing, a parent's decisions about religious upbringing may have permanent, and sometimes adverse, effects on their children's welfare. As discussed above,[150] when the Supreme Court allowed Amish parents to withdraw their children from high school in *Wisconsin v. Yoder*,[151] the parents' decisions largely foreclosed any possibility that their children could succeed outside of the Amish community.[152] Parental decisions that children should participate in religious fasting, should attend religious services, and should attend religious schools all are likely to have permanent effects on the children. Sometimes these parental decisions may have detrimental consequences.

Professor Massie apparently would accept familiar religious choices exercised by a parent, but would reject a parent's choice of spiritual healing. Professor Massie thus appears to believe that the State should not be able to accommodate spiritual healing believers, because they practice a "bad" religion.[153] However, the Supreme Court repeatedly has written that the Religion Clauses of the First Amendment prevent the State from making precisely these sorts of judgments about religious practices.[154]

Ultimately, one must remember that the First Amendment does not prohibit religious accommodation, but proscribes only the "establishment of religion."[155] Spiritual healing practitioners are a profound minority in our society.[156] A state statute that exempts this

150 *See supra* text accompanying notes 32–47.

151 406 U.S. 205, 207 (1972).

152 Professor Massie recognizes the effect of the Amish parents' decision in *Yoder*. *See* Massie, *supra* note 10, at 769–71.

153 *See id.* at 770 ("The effect of the spiritual treatment exceptions . . . is to enable parents to force harmful religious practices upon their children.").

154 *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (1993) (holding that city ordinances that proscribed the ritual sacrifice of animals violated the Free Exercise Clause, because the ordinances were intended "to target animal sacrifice by Santeria worshippers because of its religious motivation"); Larson v. Valente, 456 U.S. 228, 254 (1982) (holding that a Minnesota statute that required some churches to report contributions violated the Establishment Clause, because the law "was drafted with the explicit intention of including particular religious denominations and excluding others"); McDaniel v. Paty, 435 U.S. 618, 621–29 (1978) (plurality opinion) (holding that under the Free Exercise Clause, Tennessee could not prohibit any ordained minister from serving either in the state legislature or as a delegate at a state constitutional convention).

155 U.S. CONST. amend. I.

156 The Christian Science Church is the largest spritual healing denomination in the United States. The Church does not release membership statistics. However, estimates suggest that the Christian Science Church has between 100,000 and 170,000 members who reside in the United States. *See* Avram Goldstein, *Faith and Medicare Funding: Payments to Christian Science Nursing Centers under Attack*, WASH. POST, Mar. 22,

small group of believers from child welfare laws or criminal proscriptions simply does not "establish" faith healing as a state sanctioned religion.[157]

B. Professor Dwyer's Equal Protection Clause Challenge

In a 1996 article, Professor James G. Dwyer presents a creative argument that spiritual healing exemptions violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[158] At first glance, Professor Dwyer's argument seems intuitively plausible. By exempting parents who rely on spiritual healing from child welfare laws or criminal proscriptions, state statutes treat households that practice spiritual healing differently from other households. But on closer inspection, Professor Dwyer's Equal Protection Clause argument is highly problematic and ultimately unconvincing.

First, cases where a parent relies on spiritual healing typically do not involve the state action necessary for a Fourteenth Amendment case.[159] Without question, state spiritual healing exemptions would involve state action if such statutes barred parents who practiced spiritual healing from access to conventional medical treatment. However, state spiritual healing exemptions include no such prohibitions. Instead, these statutes allow believers to treat their children either through spiritual healing or through conventional medical care.

Rather than involving state action, these spiritual healing exemptions appear to involve state acquiescence in private conduct. Such state acquiescence does not satisfy the state action requirement. For example, where a State enacted a statute that authorized a purely private sale of a debtor's goods, the United States Supreme Court held that the statute involved "mere acquiescence in a private action" that

---

1999, at A1. In contrast, more than fifty million Catholics live in the United States. *See* J. GORDON MELTON, ENCYCLOPEDIA OF AMERICAN RELIGIONS 209 (5th ed. 1996) (noting that in 1989, about fifty-seven million Catholics lived in the United States).

157 *See also* David E. Steinberg, *Religious Exemptions as Affirmative Action*, 40 EMORY L.J. 77, 115 (1991) (asserting that members of small religious groups need protection through religious exemptions); *cf.* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 732 (1994) (Scalia, J., dissenting) (arguing that when the State of New York carved out a separate school district for a village populated entirely by an Orthodox Jewish sect, the State did not establish this religion).

158 *See* Dwyer, *supra* note 6, at 1326–28.

159 *But cf. id.* at 1366–84 (arguing that where a state statute provides a spiritual healing exemption, the statute satisfies the state action requirement).

did not amount to state action.[160] Therefore, the plaintiff could not challenge the statute under the Equal Protection Clause.[161]

Even if a plaintiff could satisfy the state action requirement, courts are unlikely to find an Equal Protection Clause violation unless a statutory classification burdens a suspect class. The Supreme Court never has held that children are a suspect class.[162] And members of religions that practice spiritual healing probably also are not a suspect class. Typically, members of a suspect class are excluded from the political process.[163] But the decisions by state legislators to enact spiritual healing exemptions indicate that elected officials are sensitive to the needs of spiritual healing believers.

However, Professor Dwyer defines the suspect class not as all spiritual healing practitioners, but rather as "children of religious objectors."[164] At this point, Professor Dwyer reveals a critical assumption that he relies on throughout his article. Specifically, Professor Dwyer asserts that the interests of parents who practice spiritual healing and the interests of their children inherently are in conflict, regardless of what the parents or children themselves say about the matter.[165] Professor Dwyer writes that not only are the children raised by spiritual healing believers unable to participate in the political process, but also "the persons who ordinarily would indirectly represent their temporal interests in the public sphere—their parents—cannot be expected to do so in this specific context."[166] Professor Dwyer continues that parents who practice spiritual healing "can be expected to *oppose* their [children's] temporal interests in the political process in con-

160 Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 164 (1978).

161 *See id.* at 164–66; *see also* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175 (1972) (holding an African-American plaintiff could not succeed in an Equal Protection Clause action brought against a discriminatory private club that had obtained a state liquor license inasmuch as the plaintiff could not establish state action, because "the Pennsylvania Liquor Control Board plays absolutely no part in establishing or enforcing the membership or guest policies of the club that it licenses to serve liquor").

162 *See* Massie, *supra* note 10, at 731 ("[C]hildren have never been defined as a suspect class requiring heightened scrutiny under [the] equal protection doctrine.").

163 *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (noting that suspect classes usually are "relegated to . . . a position of political powerlessness"); United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (noting that prejudice against discreet and insular minorities seriously may "curtail the operation of those political processes ordinarily to be relied upon to protect minorities").

164 Dwyer, *supra* note 6, at 1390.

165 *See id.* at 1406.

166 *Id.*

nection with those child welfare and education laws to which [the parents] have a religious objection."[167]

The problematic nature of Professor Dwyer's asserted conflict between the interests of spiritual healing parents and the interests of their children becomes apparent near the end of Professor Dwyer's article, when he discusses who might bring a constitutional challenge to a state statute that allowed parents to treat their children through spiritual healing.[168] The State would not bring a constitutional challenge to one of its own statutes.[169] Parents relying on a spiritual healing exemption certainly would not seek to have the statute declared unconstitutional.[170] And Professor Dwyer acknowledges that, where children in a spiritual healing household are old enough to understand an Equal Protection challenge to spiritual healing statutes,[171] these children "would in fact be likely to express *opposition* to the claim if asked, at least after their parents had a chance to discuss the matter with them."[172] Unlike the typical Equal Protection suit where a burdened minority group challenges a statutory classification, none of the affected parties apparently wish to challenge the spiritual healing exemptions.[173]

Undeterred, Professor Dwyer argues that courts should appoint a child advocate as a "next friend" to challenge spiritual healing exemptions on behalf of the affected children.[174] The fact that the children themselves would oppose the constitutional challenge purportedly brought on their behalf is inconsequential to Professor Dwyer, because he assumes that children in spiritual healing households often will be "insufficiently mature minors—even those in their teens."[175] In fact, Professor Dwyer recommends that the court-appointed representative should "stipulate at the outset that the children would oppose the appointment and the proposed litigation on their behalf if asked."[176]

---

167 *Id.*

168 *Id.* at 1465–74.

169 *See id.* at 1465 (explaining why a state "presumably would not support a constitutional challenge to its own statutes").

170 *See id.* (asserting that parents who believed in spiritual healing "would certainly oppose abolition of a statutory exemption that they presently enjoy").

171 In some cases, the affected children would be too young to understand the differences between conventional medical care and spiritual healing. *See id.*

172 *Id.*

173 *See id.*

174 *Id.* at 1466.

175 *Id.* at 1473.

176 *Id.*

When Professor Dwyer advocates the appointment of a next friend to prosecute litigation on behalf of children who do not want to bring suit, the radical nature of Professor Dwyer's proposal becomes evident. Professor Dwyer would not trust the welfare of children in spiritual healing households either to the State—which allowed parents to choose spiritual healing—to the children's parents, or even to the children themselves. Instead, Professor Dwyer believes that the individuals best situated to protect the welfare of these children would be an appointed child advocate and a judge—both of whom presumably would share Professor Dwyer's antipathy toward spiritual healing. Professor Dwyer's approach conflicts with the long-standing traditions of state regulation of families, parental autonomy, and religious toleration.

Professor Dwyer's approach also would lead to the radical result that, whenever the State treats various children differently, the State may face an Equal Protection Clause challenge. Consider the following example. Billy Pilgrim and Valencia Merble are married. Billy and Valencia live in the State of Ilium with their teenage daughter, Barbara Pilgrim.[177]

Billy and Valencia both want Barbara to attend a single-sex, Catholic, parochial high school in Ilium, rather than the co-ed, public high school. Barbara also wants to attend the Catholic school. As mandated by the United States Constitution, an Ilium state statute permits parents to send their children to private schools.[178]

According to Professor Dwyer's approach, the state statute that allows Billy and Valencia to send their child Barbara to a private religious school constitutes state action. Barbara presumably will receive somewhat different instruction at the parochial school than other neighborhood children will receive in public schools. Therefore, a court should appoint a child advocate, who will bring an Equal Protection Clause challenge against the statute that allows Billy and Valencia to opt out of the public school system. The fact that Billy and Valencia believe that Barbara's best interests would be served if she attended the parochial school is irrelevant, because their interests are inevitably opposed to the interests of their daughter. Nor should a court pay any attention to Barbara's desires, because Barbara is not sufficiently mature to make an informed choice about the school that she should attend.

177 I have borrowed these names from Kurt Vonnegut's classic novel, *Slaughterhouse Five*. KURT VONNEGUT, JR., SLAUGHTERHOUSE FIVE 23–25, 107 (1969).

178 *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–36 (1925) (invalidating an Oregon statute that did not allow parents to educate their children in private schools).

Whether Professor Dwyer actually would favor such an Equal Protection Clause challenge to parochial school attendance is unclear. Professor Dwyer would find an Equal Protection Clause violation where state statutes exempt religious schools from laws that prohibit gender discrimination and thus permit "[s]exist teaching"[179] at Fundamentalist Christian and Orthodox Jewish schools. Professor Dwyer contrasts these fundamentalists schools with private Catholic schools, which are "much more mainstream in their orientation than fundamentalist Christian schools that have fought vehemently against state regulation in recent years."[180]

Ultimately, like Professor Massie's Establishment Clause challenge, Professor Dwyer's Equal Protection Clause challenge is premised on an antipathy toward spiritual healing. For Professor Dwyer, it is irrelevant that the State has permitted parents to choose spiritual healing, that parents freely have chosen to treat their children with spiritual healing, and that the children themselves agree with their parents' choice. A court should preempt the decision of the parents and their children, because spiritual healing simply is a bad choice.[181]

CONCLUSION

A parent's decision to treat their children with spiritual healing is supported by the religious choice principle and the parental autonomy principle. This Essay asserts that a State should disrupt such a parental choice only where a parent's refusal to seek conventional medical care threatens a child with serious physical harm or illness. Further, I have argued that the State should intervene only if conventional medical treatment offers a fair probability of substantially improving a child's health. Finally, I have addressed and ultimately rejected two sophisticated constitutional arguments, which would invalidate statutory exemptions permitting parents to treat their children with spiritual healing.

For believers in conventional medical science, a parent's decision to treat his child through spiritual healing may appear unenlightened and even cruel. However, the United States has refused to mandate

179 Dwyer, *supra* note 6, at 1344–45.

180 *Id.* at 1459–60.

181 Professor Dwyer's antipathy toward spiritual healing emerges throughout his article. *See id.* at 1395 (noting that spiritual healing households "visit suffering on children based on their parents' 'pieties'"); *id.* at 1443 (asserting that research demonstrates that an upbringing in a conservative, authoritarian, religious household "retards development"); *id.* at 1477 (describing the purpose of spiritual healing exemptions as "a naked preference for the interests of parents over the interests of children").

that citizens must submit to a prescribed orthodoxy. Instead, our nation has followed a tradition of religious toleration, where the majority has respected a variety of divergent religious choices. Cases involving children and spiritual healing may involve the greatest challenge to this tradition.