

The Religion Clauses and Parental Health Care Decisionmaking for Children: Suggestions for a New Approach

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Introduction

NEGLECT [defined]. Negligent treatment or maltreatment of a child, including the failure to provide adequate food, medical treatment, clothing or shelter; *provided, that a parent or guardian legitimately practicing his religious beliefs who thereby does not provide specified medical treatment for a child, for that reason alone, shall not be considered a negligent parent or guardian;* however, such an exception shall not preclude a court from ordering that medical services be provided to the child, where his health requires it.¹

What is wrong with this picture? Apparently nothing, in the eyes of legislators in Alabama, at least forty-one other states, and the District of Columbia. These forty-three jurisdictions have legislation exempting spiritual treatment of minor children from the reach of either regulatory or criminal statutes pertaining to dependent, abused, or neglected children.²

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1. ALA. CODE § 26-14-1(2) (1992) (emphasis added).

2. Eight of these states include such exemptions in both regulatory and criminal codes. In addition to the regulatory Alabama statute quoted, see ALA. CODE § 13A-13-6(b) (1982) (criminal child endangerment); ALASKA STAT. § 11.51.120(b) (1993) (criminal nonsupport); ALASKA STAT. § 47.17.020(8)(d) (1990) (reporting); ARIZ. REV. STAT. ANN. § 8-201.01 (1989) (regulatory definition); ARIZ. REV. STAT. ANN. § 8-531.01 (1989) (termination of parent-child relationship); ARIZ. REV. STAT. ANN. § 8-546(B) (Supp. 1993) (regulatory definition); ARK. CODE ANN. § 5-27-221(4)(c) (Michie 1987) (criminal offense of

permitting child abuse); ARK. CODE ANN. § 9-30-103(5)(B) (Michie 1991) (regulatory definition); CAL. PENAL CODE § 270 (West 1993) (criminal child abandonment and neglect); CAL. WELF. & INST. CODE § 300.5 (West 1984) (jurisdiction); COLO. REV. STAT. § 19-3-103(1) (West Supp. 1993) (criminal child neglect); COLO. REV. STAT. § 18-6-401 (West Supp. 1993) (criminal child abuse); CONN. GEN. STAT. ANN. § 17a-104 (West 1992) (reporting); CONN. GEN. STAT. ANN. § 46b-120 (West Supp. 1993) (regulatory definition); DEL. CODE ANN. tit. 11, § 1104 (1974) (criminal child endangerment); D.C. CODE ANN. § 2-1356 (1988) (reporting); D.C. CODE ANN. § 16-2301(9)(f) (1988) (regulatory definition); FLA. STAT. ANN. § 415.503(9)(f) (West Supp. 1993) (regulatory definition); GA. CODE ANN. § 15-11-2(8)(D) (Supp. 1992) (regulatory definition); IDAHO CODE § 18-401(2) (1987) (criminal nonsupport); ILL. ANN. STAT. ch. 325, para. 5/4 (Smith-Hurd 1993) (reporting); IND. CODE ANN. § 35-46-1-4(a)(4) (Burns 1985) (criminal child neglect); IOWA CODE ANN. § 726.6(1)(d) (West 1993) (criminal child endangerment); KAN. STAT. ANN. § 21-3608(1)(c) (1988) (criminal child endangerment); KY. REV. STAT. ANN. § 600.020(1) (Baldwin 1990) (regulatory definition); LA. REV. STAT. ANN. § 14:403(B)(4) (West 1986) (criminal child abuse); ME. REV. STAT. ANN. tit. 17-A, § 557 (West 1983) (criminal offenses against the family); ME. REV. STAT. ANN. tit. 22, § 4010(1), (2) (West Supp. 1992) (criminal child endangerment); MD. CODE ANN., FAM. LAW § 5-701(n)(2) (1991) (regulatory definition); MICH. COMP. LAWS ANN. § 722.634 (§ 14) (West 1993) (reporting); MINN. STAT. ANN. § 609.378(1)(a)(1) (West Supp. 1994) (criminal child neglect); MISS. CODE ANN. § 43-21-105 (l)(i), (m) (Supp. 1992) (regulatory definition); MO. ANN. STAT. § 210.115(3) (Vernon Supp. 1993) (reporting); NEV. REV. STAT. ANN. § 200.5085 (Michie 1992) (criminal child neglect); N.H. REV. STAT. ANN. § 639:3(IV) (1986) (criminal child endangerment); N.H. REV. STAT. ANN. § 169-C:3(XIX)(c) (1990) (regulatory definition); N.J. STAT. ANN. § 9:6-1.1 (West 1993) (regulatory definition); N.J. STAT. ANN. § 9:6-1.21(c) (West 1993) (regulatory definition); N.M. STAT. ANN. § 32-1-3(L)(5), (M)(4) (Michie Supp. 1992) (regulatory definition); N.Y. PENAL LAW § 260.15 (McKinney 1989) (criminal child endangerment); N.D. CENT. CODE § 50-25.1-05.1(2) (1989) (reporting); OHIO REV. CODE ANN. § 2919.22(A) (Baldwin 1992) (criminal child endangerment); OHIO REV. CODE ANN. § 2151.03(B) (Baldwin Supp. 1992) (regulatory definition); OKLA. STAT. ANN. tit. 21, § 852 (West Supp. 1994) (criminal omission to fail to provide for a child); OR. REV. STAT. § 419.500(1) (1991) (reporting); 23 PA. CONS. STAT. ANN. § 6303 (Supp. 1991) (regulatory definition); R.I. GEN. LAWS § 40-11-15 (1990) (regulatory definition); TENN. CODE ANN. § 37-1-157(B) (Supp. 1993) (criminal contribution to neglect); UTAH CODE ANN. § 78-3a-19.5 (1992) (jurisdiction); VT. STAT. ANN. tit. 33, § 4912(3)(c) (1991) (regulatory definition); VA. CODE ANN. § 18.2-314 (Michie 1988) (criminal failure to secure medical attention for injured child); VA. CODE ANN. § 16.1-228(2) (Michie 1988) (regulatory definition); VA. CODE ANN. § 18.2-371.1(C) (Michie Supp. 1993) (criminal child abuse and neglect); WASH. REV. CODE ANN. § 26.44.020(3) (West Supp. 1993) (regulatory definition); W. VA. CODE § 49-7-7(c) (1992) (criminal contribution to child neglect); WIS. STAT. ANN. § 48.981(c)(4) (West 1987) (reporting); WIS. STAT. ANN. § 448.03(6) (West 1988) (reporting); WIS. STAT. ANN. § 948.03(6) (West Supp. 1993) (criminal child abuse); WYO. STAT. § 14-3-202(a)(vii) (Supp. 1993) (regulatory definition).

In addition, three states' regulatory provisions are ambiguous. *See, e.g.*, N.C. GEN. STAT. § 7A-517(21) (1993) (defining a "Neglected Juvenile" as one who, *inter alia*, "is not provided necessary medical care or other remedial care recognized under State law"); *see also* MONT. CODE ANN. § 41-3-102(4) (1991) (similar wording); S.C. CODE ANN. § 20-7-490(C)(3) (Law Co-op. 1985) (similar wording). It is unclear whether spiritual treatment of a minor otherwise meeting the definition would constitute "other remedial care" recognized by these states' laws. Thus, only five states have no provisions possibly exempting from their child abuse and neglect laws parents who choose to treat their children's severe medical conditions by spiritual means alone: Hawaii, HAW. REV. STAT. § 350-4 (Supp. 1992) (former religious exemption repealed); Massachusetts, S. 219, 178th Gen. Ct., 1993

While some dispute the wisdom³ or legitimacy⁴ of the italicized provision, many people seem to agree that an exemption from regulatory or criminal statutes for religiously motivated parental behavior simply manifests appropriate respect for religious diversity in a heterogeneous society.⁵ Yet the past ten years have seen an increasing

Mass. Sess. (Dec. 28, 1993) (striking sentence containing exemption from MASS. GEN. LAWS ANN. ch. 273, §1(4) (West 1990)); and Nebraska, South Dakota, and Texas; see U.S. DEP'T OF HEALTH AND HUMAN SERVICES, STATE STATUTES RELATED TO CHILD ABUSE AND NEGLECT: 1986 724, 727, 728 (1987) (noting South Dakota repeal and also that no exemption statutes could be found for Nebraska or Texas).

3. See, e.g., RITA SWAN, CRY, THE BELOVED CHILDREN (1993) (urging repeal of exemptions); 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 (1991) (urging repeal of exemptions, calling on the Department of Health and Human Services to require repeal by states, and questioning constitutionality of exemptions); Janet J. 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 (1993) (advocating prosecution of parents whose children die after spiritual treatment); Donna K. LeClair, Comment, *Faith-Healing and Religious-Treatment Exemptions to Child-Endangerment Laws: Should Parental Religious Practices Excuse the Failure to Provide Necessary Medical Care to Children?*, 13 U. DAYTON L. REV. 79 (1987) (urging pressure on state legislatures to repeal exemptions); Judith I. Scheiderer, Note, *When Children Die as a Result of Religious Practices*, 51 OHIO ST. L.J. 1429 (1990) (opposing exemptions and calling for murder (rather than manslaughter) prosecutions). See also American Academy of Pediatrics Committee on Bioethics, *Religious Exemptions from Child Abuse Statutes*, 81 PEDIATRICS 169 (Jan. 1988); *Religious Exemptions in Child Abuse Legislation*, PROCEEDINGS HOUSE OF DELEGATES (Bd. of Trustees, Am. Med. Ass'n), Dec. 7-10, 1988, at 145; Edward Dolnick, *Murder by Faith*, IN HEALTH, Jan.-Feb. 1990, at 59; Andrew Skolnick, *Religious Exemptions to Child Neglect Laws Still Being Passed Despite Convictions of Parents*, 264 JAMA 1226 (1990); Christopher B. Daly, *Faith-Healing on Trial in Boston*, WASH. POST, May 22, 1990, at A3.

4. See, e.g., RITA SWAN, THE LAW'S RESPONSE WHEN RELIGIOUS BELIEFS AGAINST MEDICAL CARE IMPACT ON CHILDREN 52-54 (1990) [hereinafter SWAN, LAW'S RESPONSE] (arguing against exemptions on both policy and constitutional grounds); see generally Monopoli, *supra* note 3 (questioning constitutionality); Jennifer Trahan, *Constitutional Law: Parental Denial of a Child's Medical Treatment for Religious Reasons*, 1989 ANN. SURV. AM. L. 307 (questioning constitutionality of some specific formulations that designate only Christian Scientists or that "require spiritual treatment according to the tenets of a recognized church by an accredited practitioner"); Rita Swan, *Should Government Rule When Faith, Science, Clash? Pro: First Amendment Does Not Give the Right to Injure Children*, L.A. TIMES, July 14, 1990, at F16, F17.

5. See, e.g., JoAnna A. Gekas, Note, *California's Prayer Healing Dilemma*, 14 HASTINGS CONST. L.Q. 395 (1987) (respecting parental religious rights but also proposing statutory amendments to resolve constitutional problems and to require medical care where permanent physical damage to child could result); Daniel J. Kearney, Comment, *Parental Failure to Provide Child with Medical Assistance Based on Religious Beliefs Causing Child's Death—Involuntary Manslaughter in Pennsylvania*, 90 DICK. L. REV. 861 (1986) (decrying unfairness of criminal punishment where parents have lost a child and proposing statute recognizing exemption from criminal liability while permitting courts to order medical care); Shelli D. Robinson, Comment, *Commonwealth v. Twitchell: Who Owns the Child?*, 7 J. CONTEMP. L. & POL'Y 413 (1991) (defending rights of parents to make medical decisions

number of state prosecutions of parents for such crimes as involuntary manslaughter or felony child endangerment in circumstances where their minor child has been treated by spiritual means alone and has died from conditions commonly thought treatable by conventional medical care.⁶ Prosecutions and convictions have been upheld in a number of reported cases.⁷ Where they have been struck down, the basis for reversal has commonly been a lack of due process, namely, the failure to provide adequate notice of criminality to parents relying

for minor children for either religious or non-religious reasons); Edward E. Smith, Note, *The Criminalization of Belief: When Free Exercise Isn't*, 42 HASTINGS L.J. 1491 (1991) (arguing that prosecution for spiritual treatment violates free exercise rights because assessing culpability necessarily involves punishment of belief, not just practice); Deborah S. Steckler, Note, *A Trend Toward Declining Rigor in Applying Free Exercise Principles: The Example of State Courts' Consideration of Christian Science Treatment for Children*, 36 N.Y.L. SCH. L. REV. 487 (1991) (similarly arguing that assessment of culpability is a judgment of reasonableness of belief, an inquiry prohibited by free exercise principles); Eric W. Treene, Note, *Prayer-Treatment Exemptions to Child Abuse and Neglect Statutes, Manslaughter Prosecutions and Due Process of Law*, 30 HARV. J. ON LEGIS. 135 (1993) (defending exemptions but proposing amendments to require parental notification to child welfare authorities if child has severe illness and permitting court to order treatment where appropriate). Federal agency support for the exemption is discussed *infra*, note 45 and accompanying text.

6. Rita Swan lists 42 prosecutions and their prosecutors. Forty of the cases involved deaths. Charges are pending in three of the cases. Of the remaining 39, 23 resulted in convictions at the trial level (although three were overturned); seven cases involved pleas of guilty or no contest; six resulted in acquittals; and charges were dismissed in three on constitutional grounds. The list was last updated February 20, 1993. RITA SWAN, CHARGES FILED SINCE 1982 AGAINST PARENTS WHO WITHHELD LIFESAVING MEDICAL CARE FROM CHILDREN ON RELIGIOUS GROUNDS 1, 15 (1993). Rita Swan is a former Christian Scientist whose 15-month-old son died of bacterial meningitis. She and her husband sued the church for misdiagnosis under Michigan's medical malpractice act, but the case was dismissed. *Brown v. Laitner*, 435 N.W.2d 1 (Mich. 1989). She founded Children's Healthcare Is a Legal Duty (CHILD, Inc.), an organization dedicated to children's rights to "health care of proven value without exception for religious belief." SWAN, *supra* note 3, at 1.

7. *Walker v. Superior Court*, 763 P.2d 852 (Cal. 1988), *cert. denied*, 491 U.S. 905 (1989) (prosecution for manslaughter and felony child endangerment upheld where four-year-old died of acute meningitis); *People v. Rippberger*, 231 Cal. App. 3d 1667 (1991) (conviction for felony child endangerment upheld where eight-month-old died of bacterial meningitis); *Hall v. State*, 493 N.E.2d 433 (Ind. 1986) (conviction for reckless homicide upheld where child died of pneumonia); *Bergmann v. State*, 486 N.E.2d 653 (Ind. Ct. App. 1985) (convictions for reckless homicide and neglect of a dependent upheld when nine-month-old died of bacterial meningitis); *Funkhouser v. State*, 763 P.2d 695 (Okla. Crim. App. 1988), *cert. denied*, 490 U.S. 1066 (1989) (conviction for second-degree manslaughter upheld in death of three-month-old from pneumonia); *Commonwealth v. Barnhart*, 497 A.2d 616 (Pa. Super. Ct. 1985), *cert. denied*, 488 U.S. 817 (1988) (conviction for involuntary manslaughter upheld in death of two-year-old from cancer); *State v. Norman*, 808 P.2d 1159 (Wash. Ct. App. 1991) (conviction for first-degree manslaughter upheld in death of 10-year-old from juvenile diabetes).

on statutory exemptions.⁸ In other words, state courts have generally agreed that exemptions for religiously motivated parental behavior found in statutes defining civil duties or misdemeanor neglect nevertheless do not evidence legislative intent to bar prosecutions for felonious parental behavior resulting in death as delineated in other sections of the criminal code,⁹ although some appellate courts have reversed convictions on the grounds that defendants should have been permitted to present a defense of reasonable reliance on an exemption.¹⁰ Defenses based solely on the Free Exercise Clause of the First Amendment have not been persuasive.¹¹

8. *Lybarger v. People*, 807 P.2d 570 (Colo. 1991) (conviction for felony child abuse in death of five-week-old from pneumonia reversed for erroneous instructions on the "treatment by spiritual means" defense); *Hermanson v. State*, 604 So. 2d 775 (Fla. 1991) (conviction for felony child abuse and third-degree murder for death of four-year-old from juvenile diabetes reversed on the grounds that parents lacked fair notice of the point at which their conduct became criminal); *Commonwealth v. Twitchell*, 617 N.E.2d 609 (Mass. 1993) (conviction for involuntary manslaughter where two-year-old died of bowel obstruction reversed and remanded for failure to instruct on affirmative defense of parents' reasonable belief that they were protected by the statutory exemption); *State v. McKown*, 475 N.W.2d 63 (Minn. 1991), *cert. denied*, 328 U.S. 833 (1992) (conviction for second-degree manslaughter in death of 11-year-old from juvenile diabetes reversed for lack of fair notice where parents relied on spiritual treatment exemption); *State v. Miskimens*, 490 N.E.2d 931 (Ohio Ct. Com. Pl. 1984) (charges in death of child dismissed on due process/lack of fair notice grounds, but spiritual treatment exemption held unconstitutional); *cf. State v. Lockhart*, 664 P.2d 1059 (Okla. Crim. App. 1983) (acquittal on charges of misdemeanor manslaughter affirmed where nine-year-old died of peritonitis, on grounds that statutory exemption provided a defense).

9. *Walker*, 763 P.2d at 856-66; *Rippberger*, 231 Cal. App. 3d at 1686-88; *Lybarger*, 807 P.2d at 575-79; *Hall*, 493 N.E.2d at 435; *Bergmann*, 486 N.E.2d at 660-62; *Twitchell*, 617 N.E.2d at 614; *McKown*, 475 N.W.2d at 65-67; *Barnhart*, 497 A.2d at 620-21; *Funkhouser*, 763 P.2d at 697. *Contra Hermanson*, 604 So. 2d at 775-77 (statutes are ambiguous and create a trap for religiously motivated parents); *Miskimens*, 490 N.E.2d at 938 (statute fails to provide notice of what conduct is forbidden); *Lockhart*, 664 P.2d at 1060 (exemption statute provided a defense).

10. *Lybarger*, 807 P.2d at 570; *Twitchell*, 617 N.E.2d at 609.

11. *Walker*, 763 P.2d at 869-71; *Rippberger*, 231 Cal. App. 3d at 1688-89; *Barnhart*, 497 A.2d at 621-25; *Norman*, 808 P.2d at 1163.

In Minnesota, where the state supreme court reversed a mother's and a stepfather's second-degree manslaughter convictions for lack of adequate notice, a civil jury last summer awarded the child's natural father more than five million dollars in compensatory damages against the same parties and four other defendants, as well as an additional nine million dollars in punitive damages against the Christian Science Church, of which the mother and stepfather were members. The defendants have appealed. *See McKown*, 475 N.W. 2d at 63; Patrick Sweeney, *\$5 Million Verdict Returned Christian Science Church, Mother Held Responsible in Boy's Death*, ST. PAUL PIONEER PRESS, Aug. 19, 1993, at A1; Patrick Sweeney, *Jury Gives \$9 Million in Punitive Damages Christian Science Church Faces Cost in Death of Boy, 11, Who Had Diabetes*, ST. PAUL PIONEER PRESS, Aug. 26, 1993 at A1; *see also Christian Scientists Ordered to Pay \$9 Million*, CHRISTIANITY TODAY, Oct. 4, 1993, at 53; Patrick Sweeney, *Activist Pleased That Jury Set Punitive Damages but*

Various groups and some commentators have called for the repeal of these laws, contending that they fail to protect children adequately.¹² Although a number of the exemptions, like the Alabama law quoted above, explicitly provide for court-ordered medical care where a child's life or welfare is at stake,¹³ and although courts will issue such orders even absent statutory authorization,¹⁴ the case law is inconsistent.¹⁵ Furthermore, a number of severely ill children clearly fail to come to the attention of the appropriate authorities in time to save their lives or prevent debilitating effects to their health.¹⁶

This Article argues that statutes providing exemptions from the reach of child abuse and neglect laws for religiously motivated parents

She's Unsure if Church Will Alter Views, ST. PAUL PIONEER PRESS, Aug. 26, 1993, at 6A (noting Rita Swan's favorable reaction to the award).

12. See sources cited *supra* note 3; see also Rita Swan, *Coalition to Repeal Religious Exemptions to Child Abuse Laws*, CHILDREN'S HEALTHCARE IS A LEGAL DUTY, INC. (CHILD, Inc.), No. 4, 1992, at 2 (listing 27 groups as members of the Massachusetts Coalition to Repeal Religious Exemptions to Child Abuse Laws).

13. In addition to Alabama, eleven other states specifically allow courts to order medical aid over religious objections. See COLO. REV. STAT. § 19-3-103(1) (Supp. 1993); COLO. REV. STAT. § 18-6-401 (Supp. 1993); FLA. STAT. ANN. § 415.503(9)(f) (West Supp. 1993); IOWA CODE ANN. § 726.6(1)(d) (West Supp. 1993); KY. REV. STAT. ANN. § 600.020(1) (Baldwin 1990); MICH. COMP. LAWS ANN. § 722.634 (West 1993); MISS. CODE ANN. § 43-21-105(l)(i), (m) (1993); MO. ANN. STAT. § 210.115(3) (Vernon Supp. 1993); N.D. CENT. CODE § 50-25.1-05.1(2) (1989); OKLA. STAT. ANN. tit. 21, § 852 (West Supp. 1994); OR. REV. STAT. § 419.500(1) (1991); R.I. GEN. LAWS § 40-11-15 (1990); see also *infra* notes 36, 40 and accompanying text (federal policy).

14. See *People v. Labrenz*, 104 N.E.2d 769 (Ill.) (court ordered blood transfusion to treat RH blood condition), *cert. denied*, 344 U.S. 824 (1952); *In re McCauley*, 565 N.E.2d 411 (Mass. 1991) (court ordered blood transfusion to treat leukemia); *State v. Perricone*, 181 A.2d 751 (N.J.) (in spite of the court-ordered blood transfusions to treat a heart murmur, the child died), *cert. denied*, 371 U.S. 890 (1962); *Muhlenberg Hosp. v. Patterson*, 320 A.2d 518 (N.J. Super. Ct. Law Div. 1974) (court ordered blood transfusion to treat jaundice); *In re Gregory S.*, 380 N.Y.S.2d 620 (N.Y. Fam. Ct. 1976) (court ordered dental care); *In re Willmann*, 493 N.E.2d 1380 (Ohio Ct. App. 1986) (court ordered medical treatment for osteogenic sarcoma); *In re Cabrera*, 552 A.2d 1114 (Pa. Super. Ct. 1989) (court ordered blood transfusion to treat sickle-cell anemia); *In re Hamilton*, 657 S.W.2d 425 (Tenn. Ct. App. 1983) (court ordered medical treatment for Ewing's Sarcoma); *Mitchell v. Davis*, 205 S.W.2d 812 (Tex. Civ. App. 1947) (court ordered medical treatment for arthritis).

15. Compare *In re Seiferth*, 127 N.E.2d 820 (N.Y. 1955) (court dismissed petition requesting surgery for severe cleft palate and harelip because condition posed no present emergency to life) with *In re Sampson*, 278 N.E.2d 918 (N.Y. 1972) (court ordered surgery to correct massive deformity of right side of face and neck); compare also *Newmark v. Williams*, 588 A.2d 1108 (Del. 1991) (court refrained from ordering cancer therapy because chance of recovery was only 40%) with *Hamilton*, 657 S.W.2d at 425 (court ordered cancer treatment when chance for recovery was 25-50%).

16. See SWAN, *supra* note 6, at 1-15 (describing forty-two prosecuted cases since 1982, in forty of which the child had died); SWAN, *supra* note 3 (reporting deaths and debilitating permanent effects of severely ill children untreated by conventional medical care for religious reasons); see generally SWAN, LAW'S RESPONSE, *supra* note 4.

who provide spiritual treatment rather than conventional medical care for their severely ill minor children violate the Establishment Clause of the First Amendment to the United States Constitution.¹⁷ Far from constituting an appropriate preserve of free exercise values, or even a permissible accommodation of religious diversity in a society that respects heterogeneity, these laws impermissibly allow parents to impose their own religious beliefs and practices upon their minor children, who are incapable of making either religious or medical decisions for themselves, precisely under circumstances in which those children are the most vulnerable.

Even assuming that the Free Exercise Clause protects some elements of conduct as well as belief,¹⁸ that protection ends where the conduct violates the rights of another. By permitting parents to violate their children's own religious freedom,¹⁹ spiritual treatment accommodation statutes overstep Establishment Clause boundaries. In fact, they constitute a prohibited "endorsement" of religion under criteria proposed by Justice Brennan, which serve well as a measuring standard for the constitutional validity of laws exempting religiously motivated behavior from otherwise applicable general regulations.²⁰

Additionally, these exemptions violate the rights of children under the Equal Protection Clause of the Fourteenth Amendment.²¹ Children have never been defined as a suspect class requiring heightened scrutiny under equal protection doctrine,²² but under the com-

17. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I.

18. See *infra* notes 46-65 and accompanying text (discussing various philosophical viewpoints with respect to this question).

19. See *infra* notes 237-50 and accompanying text.

20. *Texas Monthly, Inc., v. Bullock*, 489 U.S. 1, 15 (1989); see *infra* notes 218-21 (discussing Justice Brennan's criteria); for a discussion of Justice O'Connor's development of the "endorsement" concept, see *infra* notes 149-52 and accompanying text.

21. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1, cl. 4.

22. Under the Equal Protection Clause of the Fourteenth Amendment, governmental classifications of persons are generally, like most governmental actions, subjected by courts only to a rational basis standard of review and will be upheld if they are reasonably related to a legitimate governmental interest. However, classifications based upon certain "suspect" categories, notably race or alienage, receive strict scrutiny and must be narrowly tailored to a compelling governmental interest; classifications based on gender or illegitimacy receive a heightened review that is less than strict scrutiny. The Supreme Court has refused to extend heightened scrutiny to classifications based on wealth or age. See generally JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 14.3, at 573-80 (4th ed. 1991); see also LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §16-31, at 1588-89 (2d ed. 1988) (discussing children as illustrative of a politically powerless minority that does not receive heightened scrutiny).

mon law concept of *parens patriae*,²³ and given that children have their own constitutionally protected rights,²⁴ state courts and the United States Supreme Court have repeatedly regarded governmental actions specifically affecting the welfare of children with special care.²⁵ In light of the particular obligations of government to protect children, it is indefensible to hold that children who would be found abused or neglected in one context are simply the legitimate objects of their parents' religious rights in another.

Parents do have constitutionally protected rights to bring up and educate their children as they see fit, including the specific right to inculcate in their children their own religious views.²⁶ Parental rights, however, arise not from a concept that parents "own" their children,²⁷

23. "Literally, *parent of the country*, refers traditionally to role of state as sovereign and guardian of persons under legal disability It is the principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990) (citations omitted) (emphasis added).

24. See, e.g., *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969) (upholding the First Amendment rights of middle school and high school students to wear black armbands to school protesting the Vietnam War); see also *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (acknowledging student's First Amendment freedom of expression but distinguishing *Tinker* and upholding school's right to regulate vulgar and offensive speech as a part of its educational function); *In re Gault*, 387 U.S. 1 (1967) (addressing children's rights at delinquency hearing in juvenile court); see generally Nat Stern, *The Burger Court and the Diminishing Constitutional Rights of Minors: A Brief Overview*, 1985 ARIZ. ST. L.J. 865, 870-80 (arguing that minors have distinct constitutional rights); Bernard J. Coughlin, *The Rights of Children*, in THE RIGHTS OF CHILDREN: EMERGENT CONCEPTS IN LAW AND SOCIETY 7 (Albert E. Wilkerson ed. 1973) (children have inalienable rights including the right to life, food, and shelter); Lois G. Forer, *Rights of Children: The Legal Vacuum*, in THE RIGHTS OF CHILDREN, *supra*, at 24 (exploring avenues for providing children with "substantive and procedural laws to guarantee and implement" their rights).

25. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) (noting that dealing with conflict between parents and state over control of child is serious); see also *infra* notes 256-66 and accompanying text; see generally SAMUEL M. DAVIS & MORTIMER D. SCHWARTZ, CHILDREN'S RIGHTS AND THE LAW 51-78 (1987) (discussing Supreme Court cases dealing with children's rights).

26. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (upholding rights of Old Order Amish parents to withdraw children from school after the eighth grade, despite a statute requiring them to continue in school until age sixteen); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (upholding rights of parents to send their children to private, rather than public, school, specifically including a religiously affiliated school); see also *Meyer v. Nebraska*, 262 U.S. 390 (1923) (upholding rights of parents to hire a teacher of German at a private school, to that extent invalidating a statute forbidding teaching of a foreign language prior to eighth grade).

27. Although the common law at one time regarded children as the property of their parents, this view has been superseded out of concern for the well being of children; the state may intervene on children's behalf when parents act to their detriment. See Angela R. Holder, *Special Categories of Consent: Minors and Handicapped Newborns*, in 3 TREA-

but from the presumption that parents normally act in their children's best interests.²⁸ Therefore, their rights have always ended where danger to the welfare of their children begins.²⁹ Indeed, the constitutional protections governing parental rights (with the underlying assumptions upon which they are based) are themselves the appropriate source of criteria in questions of medical decisionmaking for minor children. When courts are called upon to decide whether to order specific medical treatments for children over parental objection, their decisions should be governed by appropriate respect for parental decisionmaking rights, on the one hand, and appropriate concern for the children's welfare, on the other. The presence or absence of religious motivation in the parental decisionmaking process should be irrelevant. Viewed in this light, case outcomes concerning alleged abuse or medical neglect of children, whether arising before any injury (in the form of possible court orders mandating specific medical treatment) or after a deleterious outcome (in the form of prosecutions or civil lawsuits) should achieve a greater consistency as society strives to protect the health and welfare of all our children.

I. Legislative History: The Changing Shape of Federal Policy

The idea that parents may not use religious grounds to shield themselves from prosecution for failure to provide adequate medical care for their minor children is not new. Beginning with the New York ruling in *People v. Pierson*,³⁰ cases early in this century established the general rule that spiritual healing alone was not sufficient to

TISE ON HEALTH CARE LAW §§ 19.01, 19.05 (Michael G. MacDonald et al. eds., 1991); Karen H. Rothenberg, *Medical Decision Making for Children*, in 1 *BIOLAW: A LEGAL AND ETHICAL REPORTER ON MEDICINE, HEALTH CARE, AND BIOENGINEERING* § 8-2.1 (James F. Childress et al. eds., 1989).

28. See, e.g., *Parham v. J.R.*, 442 U.S. 584, 602-03 (1979); see *infra* note 267 and accompanying text.

29. *Parham*, 442 U.S. at 602-03; *Prince*, 321 U.S. at 166 (“[N]either rights of religion nor rights of parenthood are beyond limitation.”); *id.* at 170 (parents may not “make martyrs of their children before they have reached the age of full and legal discretion”); *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905) (liberty is “regulated by law”) (citing *Crowley v. Christensen*, 137 U.S. 86, 89 (1890)); HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*, 335 (2d ed. 1988) (parental health care decisionmaking rights for minor children are “limited by the power of the state to intercede for the protection of the child’s health, safety or welfare”); *id.* § 19.1, at 788 (“When the child’s welfare seems to conflict with the claims of one or both parents, the child’s welfare must prevail.”); see also Anderson, *supra* note 3, at 772 (“The line is drawn at the point at which great bodily harm or death will result to a child.”); see generally DAVIS & SCHWARTZ, *supra* note 25, at 79-95, 163-89 (discussing medical decisionmaking for children).

30. 68 N.E. 243 (N.Y. 1903).

fulfill a parental duty of appropriate medical care for a child and, furthermore, that the exercise of religious belief was not a defense to a criminal prosecution.³¹

In fact, very few states had religious exemption statutes before 1974,³² when Congress enacted the Child Abuse Prevention and Treatment Act.³³ The statute created the National Center on Child Abuse and Neglect to provide federal financial assistance to state, local, and voluntary agencies and organizations to strengthen their capacities for developing anti-child abuse and anti-child neglect programs and treatment centers.³⁴ The statute itself did not mention a spiritual treatment exemption. However, regulations issued by the Department of Health, Education, and Welfare (HEW) required states receiving federal financial assistance to include a religious exception in their definitions of "harm or threatened harm to a child's health or welfare":³⁵

[A] parent or guardian legitimately practicing his religious beliefs who thereby does not provide specified medical treatment for a child, for that reason alone shall not be considered a negligent parent or guardian; *However*, such an exception shall not preclude a court from ordering that medical services be provided to the child where his health requires it.³⁶

After the Act was amended,³⁷ the Department of Health and Human Services (HHS, successor to HEW) issued new regulations in 1983. In

31. *Id.* at 246-47; *see also* State v. Chenoweth, 71 N.E. 197 (Ind. 1904) (agreeing with the rationale of *Pierson*); Owens v. State, 116 P. 345 (Okla. Crim. App. 1911) (following *Pierson* and upholding conviction). These cases preceded *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (applying Free Exercise Clause to states through Due Process Clause of Fourteenth Amendment). For a later case, *see* Craig v. State, 155 A.2d 684, 690 (Md. 1959) (citing *Pierson* and upholding conviction for involuntary manslaughter against a free exercise defense but remanding for further proceedings; no exemption statute at issue).

32. According to Rita Swan, only 11 states had religious exemption laws in 1974; she attributes the HEW regulation, *infra* note 35, to pressure from the Christian Science Church. *See* SWAN, LAW'S RESPONSE, *supra* note 4, at 26-27. For other discussions of the legislative history of the federal regulations and state exemption statutes, *see* Monopoli, *supra* note 3, at 330-34; Treene, *supra* note 5, at 141-42.

33. Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified at 42 U.S.C. § 5101).

34. 39 Fed. Reg. 43,936, at 43,937 (1974) (to be codified at 45 C.F.R. § 1340.1-1). The regulation has since been modified and now provides that the Center's purpose is "to assist agencies and organizations at the national, State and community levels in their efforts to improve and expand child abuse and neglect prevention and treatment activities." 45 C.F.R. § 1340.1(a) (1992).

35. 39 Fed. Reg. 43,937 (1974) (to be codified at 45 C.F.R. § 1340.1-2(b)(1)).

36. *Id.* The language was taken from H.R. Rep. No. 685, 93d Cong., 1st Sess. 4, 5 (1973), *reprinted in* 1974 U.S.C.C.A.N. 2763, 2767.

37. Child Abuse Prevention and Treatment and Adoption Reform Act of 1978, Pub. L. No. 95-266 (to be codified at 42 U.S.C. § 1501).

reaction to comments, the revised regulations expanded the definition of "negligent treatment or maltreatment" to include "failure to provide adequate medical care."³⁸ Additionally, in light of Congress' failure to mention a religious exemption specifically, as well as comments and objections received by the agency, the Secretary concluded that there was no legal support for the exception requirement and withdrew it.³⁹ The regulation now reads as follows:

Nothing in this Part should be construed as requiring or prohibiting a finding of negligent treatment or maltreatment when a parent practicing his or her religious beliefs does not, for that reason alone, provide medical treatment for a child; provided, however, that if such a finding is prohibited, the prohibition shall not limit the administrative or judicial authority of the State to insure that medical services are provided to the child when his health requires it.⁴⁰

Despite the 1983 changes in the federal regulations, only three states have since repealed their religious exemptions.⁴¹

In 1984 the Act was amended once more.⁴² Although HHS, in amending its rules thereafter, did not solicit comments about the relationship between the requirement of adequate medical care and parental reliance on spiritual treatment, the Department noted that "almost one half of the comment letters" related to this subject.⁴³ Some advocated a federal requirement that states repeal their religious exemption statutes in order to remain eligible for assistance,⁴⁴

38. 48 Fed. Reg. 3,698, at 3,699 (1983) (to be codified at 45 C.F.R. § 1340.2(d)(3)).

39. *Id.* at 3,700 ("Thus, States are free to recognize or not recognize a religious exception without that choice having any effect on eligibility for a State child abuse grant.").

40. *Id.* at 3,702 (to be codified at 45 C.F.R. § 1340.2(d)(3)(ii)). The same language now appears at 45 C.F.R. § 1340.2(d)(2)(ii) (1992).

41. *See* HAW. REV. STAT. § 350-4 (Supp. 1992) (repealing exemption); S. 219, 178th Gen. Ct., 1993 Mass. Sess. (Dec. 28, 1993) (striking sentence containing exemption from MASS. GEN. LAWS ANN. ch. 273, § 1(4) (West 1990)). *Compare* S.D. CODIFIED LAWS ANN. § 26-8A-2(4) (1992) *with* S.D. CODIFIED LAWS ANN. § 26-8-6 (1984) (change in the regulatory definition shows that the exemption was repealed). *See also* *Effort Seeks to Force Child Medical Care Regardless of Beliefs*, L.A. TIMES, Nov. 27, 1993, at B4.

It should be noted that as of January 1994, the Massachusetts legislature was considering bills which might reverse the repeal. *See* H.R. 1529, 179th Gen. Ct., Mass. Sess. (Jan 5, 1994) (protecting traditional religions from governmentally-sanctioned constraints); H.B. 2630, 179th Gen. Ct., Mass. Sess. (Jan. 5, 1994) (proposing a constitutional amendment prohibiting laws relating to the establishment of religions).

42. The Child Abuse Amendments of 1984, Pub. L. No. 98-457 (to be codified at 42 U.S.C. § 1501).

43. 52 Fed. Reg. 3,990 at 3,993 (1987).

44. *Id.* (noting that some "commenters thought that some children from families practicing spiritual or faith healing are being denied equal protection of their rights under the Fourteenth Amendment to the Constitution").

but the Department chose to maintain the Reagan Administration's "regulatory philosophy . . . to provide maximum State and local flexibility"⁴⁵ and left its prior wording in place. Thus, despite indications of public concern about the welfare of children whose parents rely on spiritual treatment, federal policy remains permissive with respect to state accommodation statutes.

II. Free Exercise Values: Are Spiritual Treatment Exemption Statutes a Required Accommodation?

A. The Question in Context: The Accommodation Debate

Religion clause jurisprudence has provoked lively debate for a number of years, much of it stemming from the perceived clash between the protection inherent in the Free Exercise Clause and the prohibition against religious favoritism in the Establishment Clause.⁴⁶ With respect to governmental accommodation of religious beliefs and practices, the scholarship presents a broad range of views.

At one extreme, the position of formal neutrality, originally enunciated by Philip Kurland and currently represented by Mark Tushnet, interprets the Free Exercise and Establishment Clauses together to mean that "religion may not be used as a basis for classification for purposes of governmental action."⁴⁷ In other words, government simply may not take special account of religion in formulating its policies.⁴⁸ The only question that can legitimately be asked

45. *Id.* In the Department's view, a state's Child Protective Services agency "has the responsibility to investigate and decide what constitutes 'adequate medical care'; what types of care are acceptable; and what constitutes harm or substantial risk of harm to the child's health or welfare" (thereby triggering reporting requirements and a need for intervention by the CPS agency). *Id.* at 3994. See 45 C.F.R. § 1340.2(d)(2)(3) (1992).

46. One scholar has characterized the problem as "a first amendment jurisprudence that simultaneously calls for special deference to religion under the free exercise clause and a prohibition of special deference under the establishment clause." William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 358-59 (1989-90). See generally Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980) (examining the tension between the two clauses); TRIBE, *supra* note 22, at 1154 ("[T]he religion clauses, which for the Framers represented relatively clear statements of highly compatible goals, have taken on new and varied meanings that frequently appear to conflict. The tensions thus created between the two clauses represent a major theme throughout this chapter.").

47. Mark Tushnet, "Of Church and State and the Supreme Court": Kurland Revisited, 1989 SUP. CT. REV. 373, 373 (quoting Philip Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 5 (1961)).

48. In Tushnet's words, "It followed directly from Kurland's analysis [advocated by Tushnet] that exempting the activities of religious believers from generally applicable regulations, solely because of their beliefs, was impermissible." *Id.* at 377.

about the effect of governmental action on religious practice amounts to one of equal protection;⁴⁹ the Free Exercise Clause does not mandate accommodation to religious practices,⁵⁰ and the Establishment Clause positively prohibits it.⁵¹ Thus, under the formal neutrality theory, there is no room for a concept of "permissible accommodation" to conduct which is specifically religious in nature.⁵²

Other scholars, such as Ellis West⁵³ and William Marshall,⁵⁴ argue that the Free Exercise Clause does not require any particular exemptions from general regulations⁵⁵ but does leave room for legislative accommodations, at least under certain circumstances.⁵⁶

49. *Id.* at 373 (quoting Kurland, *supra* note 47, at 5); see also Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 102-10 (1990) (religion clauses should be analogized to equal protection doctrine); cf. Michael A. Paulsen, *Religion, Equality and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 315 (1986) (utilizing equal protection principles to arrive at a much more accommodationist approach than Tushnet's, *supra* note 47, or Marshall's, *infra*). For a more focused kind of "equality" approach, see Robert D. Kamenshine, *Scrapping Strict Scrutiny in Free Exercise Cases*, 4 CONST. COMM. 147, 154 (1987) (arguing that free exercise and freedom of speech should be analyzed in essentially the same manner, *i.e.*, where *conduct* is involved, the Court should use the "substantial governmental interest" standard of *United States v. O'Brien*, 391 U.S. 367 (1968)); William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545, 546-47 (1983) (arguing, partly on equal protection grounds, that "freedom of expression and free exercise provide a unitary protection for individual liberty," thereby calling for the same analysis with respect to both religious and secular ideas). Marshall, however, is not as thoroughgoing as Tushnet, *supra* note 47; Marshall would leave room for legislative accommodations, see *infra* note 56 and accompanying text.

50. Tushnet, *supra* note 47, at 377-83.

51. *Id.* at 384-96.

52. *Id.*

53. Ellis West, *The Case Against A Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591 (1990).

54. Marshall, *supra* note 46; Marshall, *supra* note 49.

55. Marshall, *supra* note 46, at 386 ("The constitutional difficulties created by special protection for religion militate against the conclusion that special treatment for religion is constitutionally compelled."); Marshall, *supra* note 49, at 593 ("Any judicially created exemption granted to those expressing a religious interest may be constitutionally required only when such an exemption would be similarly required for those expressing parallel free speech claims."); West, *supra* note 53, at 600-13 (presenting six arguments against religion-based exemptions, three of which apply to either legislative or court action); see also Steven G. Gey, *Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 78, 166-85 (1990) (arguing for the elimination of the accommodation principle).

56. Marshall, *supra* note 46, at 398-400 (permissible legislative accommodation does not violate the Establishment Clause); Marshall, *supra* note 49, at 583-84 (noting "difficult problems even with legislative accommodation" but stating that "[l]egislative accommodation, however, is a wholly different question than the question of judicially created exemptions A congressional decision to favor religion that does not violate the establishment clause simply means that all religious favoritism is not prohibited by the

Ira Lupu's position,⁵⁷ on the other hand, is a mirror image of West's and Marshall's; he maintains that the Free Exercise Clause requires some accommodations from government,⁵⁸ but he opposes legislative exemptions on Establishment Clause and policy grounds.⁵⁹ In his view, courts are the appropriate governmental bodies for drawing the requisite constitutional lines.⁶⁰

Finally, the "accommodationist" position, represented most vocally by Douglas Laycock⁶¹ and Michael McConnell,⁶² advocates a constitutional interpretation often characterized as "substantive neutrality."⁶³ This position views some religion-based exemptions to general regulations as required by free exercise principles⁶⁴ and leaves

Constitution."); West, *supra* note 53, at 634-36 (with the qualification, *id.* at 635 n.185, that "[s]uch exemptions . . . should be given only in cases where the hardship for which an exemption would provide relief was caused by the government in the first place. Otherwise, the principle of neutrality could be used to justify forms of direct aid to religion *per se.*"). The Marshall/West viewpoint is basically that taken by Justice Scalia in his opinion for the Court in *Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990) (holding that the Free Exercise Clause did not require Oregon to exempt sacramental peyote use from its general criminal statute prohibiting the use of certain controlled substances). That case has now been ostensibly overruled by the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993).

57. Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555 (1991) [hereinafter Lupu, *Reconstructing*]; Ira C. Lupu, *The Trouble With Accommodation*, 60 GEO. WASH. L. REV. 743 (1992) [hereinafter Lupu, *Trouble*].

58. Lupu, *Reconstructing*, *supra* note 57, at 561-64; Lupu, *Trouble*, *supra* note 57, at 754-62.

59. Lupu, *Reconstructing*, *supra* note 57, at 580-99; Lupu, *Trouble*, *supra* note 57, at 776-80 & n.166.

60. Lupu, *Reconstructing*, *supra* note 57, at 600-06; Lupu, *Trouble*, *supra* note 57, at 780.

61. See, e.g., Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990) [hereinafter Laycock, *Neutrality*]; Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1 [hereinafter Laycock, *Remnants*].

62. See, e.g., Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1 [hereinafter McConnell, *Accommodation*]; Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992) [hereinafter McConnell, *Update*].

63. Lupu, *Trouble*, *supra* note 57, at 744-45, 745 n.7, 772 (referring to McConnell's perspective and Laycock's position as "substantive [religious] neutrality"); see also Laycock, *Neutrality*, *supra* note 61, at 1001 (offering as a definition, "the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance"); Laycock, *Remnants*, *supra* note 61, at 13-17; McConnell, *Accommodation*, *supra* note 62, at 8-13; McConnell, *Update*, *supra* note 62, at 729.

64. Laycock, *Neutrality*, *supra* note 61, at 1014-16; Laycock, *Remnants*, *supra* note 61, at 13-21; McConnell, *Accommodation*, *supra* note 62, at 5 (declining, however, to explore the distinction between mandatory and permissible accommodations); McConnell, *Update*,

broad room for permissible accommodations before the boundaries imposed by the Establishment Clause are reached.⁶⁵

A full exploration of the broad range of philosophical debate revolving around the concept of permissible accommodation is beyond the scope of this Article. The argument here is that even from an accommodationist standpoint, statutory exemptions from child abuse and neglect laws for religiously motivated parents are not required by the Free Exercise Clause. Where they exist, they violate the Establishment Clause.

B. The Free Exercise Clause

There is no tenable argument that the Free Exercise Clause of the First Amendment *requires* an exemption for parents whose behavior would be characterized as medical child neglect absent their religious motivation; nor does the Free Exercise Clause provide a defense when religiously motivated parents are prosecuted for such crimes as manslaughter or child endangerment.⁶⁶ State courts have almost universally rejected free exercise claims in this context, whether or not the legislature has enacted a statutory exemption.⁶⁷ Although the United

supra note 62, at 687; *see also* GREGG IVERS, *REDEFINING THE FIRST FREEDOM: THE SUPREME COURT AND THE CONSOLIDATION OF STATE POWER* 134 (1993) (arguing that the Free Exercise Clause creates substantive constitutional rights which protect "the right to engage in religious conduct associated with religious faith, even if such behavior . . . necessitates an exemption from civil and criminal laws" of general applicability).

65. Laycock, *Neutrality*, *supra* note 61, at 1016; Laycock, *Remnants*, *supra* note 61, at 11-15, 68; McConnell, *Accommodation*, *supra* note 62, at 29-34; McConnell, *Update*, *supra* note 62, at 687-88 ("The accommodationist position . . . holds that accommodations are sometimes required and, within rigorous limitations . . . are always permitted."); *see also* Choper, *supra* note 46, at 685-89 (accommodation of religion is permissible so long as there is no coercion, compromise, or influence); Richard J. Neuhaus, *A New Order of Religious Freedom*, 60 *GEO. WASH. L. REV.* 620 (1992) (religious freedom is an end in itself; Establishment Clause is not interpreted); STEPHEN V. MONSMA, *POSITIVE NEUTRALITY: LETTING RELIGIOUS FREEDOM RING* 195 (1993) (agreeing with accommodationists' emphasis on religion's important role and that strict neutrality essentially supports "antireligious secularism"); *cf.* Marshall, *supra* note 46, at 411 ("[I]t is not anti-religious secularism to contend that the Constitution protects only *freedom* of religion and that the protection of religion itself . . . is only derivative.").

66. For general arguments against the idea that the Free Exercise Clause requires *any* exemptions for religiously motivated conduct, *see generally* Gey, *supra* note 55; Marshall, *supra* note 46; Tushnet, *supra* note 47, at 377-83; West, *supra* note 53.

67. *Walker v. Superior Court*, 763 P.2d 852, 869-71 (Cal. 1988), *cert. denied*, 491 U.S. 905 (1989); *People v. Rippberger*, 231 Cal. App. 3d 1667, 1688-89 (1991); *State v. Chenoweth*, 71 N.E. 197, 199 (Ind. 1904) (no statutory exemption); *Craig v. State*, 155 A.2d 684, 689-90 (Md. 1959) (note that no statutory exemption was at issue here); *People v. Pierson*, 68 N.E. 243, 246-47 (N.Y. 1903) (no statutory exemption); *Owens v. State*, 116 P. 345, 346-48 (Okla. Crim. App. 1911) (no statutory exemption); *Commonwealth v. Barn-*

States Supreme Court has not reviewed any of the relevant cases,⁶⁸ the Court's jurisprudence supports the state courts' views.

1. *The Free Exercise Clause Does Not Require the Exemption*

It is axiomatic that, although the Free Exercise Clause protects belief absolutely, religiously motivated *conduct* "remains subject to regulation for the protection of society."⁶⁹ In only a handful of cases has the Supreme Court found that the Free Exercise Clause, standing alone, commands an exception to otherwise applicable government policy.⁷⁰ Indeed, in *Employment Division, Department of Human Resources v. Smith*,⁷¹ Justice Scalia noted, "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."⁷²

Even during its apparently brief tenure,⁷³ the widely criticized⁷⁴ *Smith* analysis would not have governed a case challenging the consti-

hart, 497 A.2d 616, 620-25 (Pa. Super. Ct. 1985), *cert. denied*, 488 U.S. 817 (1988); *State v. Norman*, 808 P.2d 1159, 1163 (Wash. Ct. App. 1991).

68. *Walker*, 491 U.S. at 905 (*cert. denied*); *Funkhouser v. State*, 763 P.2d 695 (Okla. Crim. App. 1988), *cert. denied*, 490 U.S. 1066 (1989); *State v. McKown*, 475 N.W.2d 63 (Minn. 1991), *cert. denied*, 328 U.S. 833 (1992); *Barnhart*, 488 U.S. at 817 (*cert. denied*).

69. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) (applying the Free Exercise Clause to the states); *see also, e.g., Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963); *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961); *Reynolds v. United States*, 98 U.S. 145, 166 (1878).

70. *Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829 (1989); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987); *Thomas v. Review Bd., Ind. Empl. Sec. Div.*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert*, 374 U.S. at 398.

71. 494 U.S. 872 (1990).

72. *Id.* at 878-79. The case held that a criminal law of general applicability would violate the Free Exercise Clause only if it were specifically targeted at a religious practice *per se*. *Id.* at 877-78.

73. The *Smith* holding has ostensibly been superseded by the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993), but that fact does not make Justice Scalia's observation any less germane. The Act specifically finds that "in *Employment Division v. Smith* . . . the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." Section 2(a)(4) (citation omitted). The Act also states Congress' purpose "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened." Section 2(b)(b) (citations omitted). *See also infra* notes 96-111 and accompanying text (discussing the Act).

74. James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91, 115 (1991) ("*Smith* essentially rendered the Free Exercise Clause a dead letter."); *id.* at 116 ("By transparently manipulating both precedent and logic, the Court succeeded in abdicating its constitutional duty to enforce the Free Exercise Clause."); Laycock, *Remnants*, *supra* note 61, at 36 (*Smith* "fundamentally changed the law of free exercise without briefs or argument, in an abstract case created by the Court"); Lupu, *Reconstructing*, *supra* note

tutionality of spiritual treatment exemption statutes. These laws fit into a category of decisions favoring claimants to an exemption: those which "have involved . . . the Free Exercise Clause in conjunction with other constitutional protections, such as . . . the right of parents, acknowledged in *Pierce v. Society of Sisters* . . . to direct the education of their children . . ."⁷⁵ Religious education and inculcation of parental religious values, paramount in *Pierce* and *Wisconsin v. Yoder*,⁷⁶ are, of course, implicated in the spiritual treatment of ill children as well. Additionally, the Supreme Court has specifically protected the rights of parents to make medical decisions on behalf of their minor children.⁷⁷

Nonetheless, the existence of a constitutional right, whether protected by the Free Exercise Clause, the Due Process Clause,⁷⁸ or a

57, at 609 ("*Smith* is . . . profoundly wrong on both substantive and institutional grounds."); Lupu, *Trouble*, *supra* note 57, at 771 ("I . . . reject *Smith* on every level."); Harry F. Tepker, Jr., *Hallucinations of Neutrality in the Oregon Peyote Case*, 16 AM. INDIAN L. REV. 1, 27 (1991) (*Smith* "demotes previously protected free exercise rights from the categorical status of 'fundamental rights' to the lesser level of 'liberty interests'"); IVERS, *supra* note 64, at 158 (the *Smith* Court "decided that administrative convenience and political deference to lawmaking bodies were more important principles to uphold than enforcing constitutional protection for an enumerated constitutional right"); MONSMA, *supra* note 65, at 224 (the Court's opinion "is destructive of religious freedom in a major way"); *see generally* Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990) (arguing against *Smith*'s use of legal sources and its theoretical argument). *But see* Mary Ann Glendon, *Law, Communities, and the Religious Freedom Language of the Constitution*, 60 GEO. WASH. L. REV. 672, 683-84 (1992) (arguing that *Smith*'s effect on religious liberty may be more limited than initially considered); Marshall, *supra* note 46, at 386-412 (arguing against religious based exemptions); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 309 (1991) (defending "*Smith*'s rejection of constitutionally compelled free exercise exemptions"); West, *supra* note 53, at 623-33 (arguing that there is no constitutionally compelled right to religious exemptions).

75. *Smith*, 494 U.S. at 881 (citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). *Pierce* upheld the right of parents to send their children to private schools, including religiously affiliated schools, in lieu of statutorily required public education.

76. *Pierce*, 268 U.S. at 510; *Yoder*, 406 U.S. at 205. The holding in *Yoder* was based in large part on the grounds that participation in public high school life undermined traditional Amish values and training in their children. *See id.* at 218.

77. *Parham v. J.R.*, 442 U.S. 584 (1979) (upholding a statute permitting parents to commit their minor children to state mental hospitals under voluntary commitment procedures); *see infra* notes 267-70 and accompanying text.

78. Cases protecting the rights of persons to make certain decisions about the conduct of their personal and family lives, including the right to make personal medical decisions, generally trace the constitutional origins of such rights to the liberty interest protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. *See, e.g.*, *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Roe v. Wade*, 410 U.S. 113 (1973).

combination of the two, simply means that government must assert a compelling state interest and impose a restriction appropriately tailored to serve its ends.⁷⁹ The health and welfare of children has traditionally been viewed as a state interest of the highest order, permitting intervention by the machinery of government whenever that welfare has been deemed to be threatened. Thus, the common law concept of *parens patriae*⁸⁰ permits the state to intervene in parental decision-making potentially harmful to a minor child.⁸¹ The Supreme Court has recognized the state's right to restrict otherwise constitutionally protected parental decisionmaking when a child's welfare is at stake. Characterizing the state's *parens patriae* powers, the Court specifically noted in *Prince v. Massachusetts*⁸² that "[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."⁸³ Upholding the application of child labor laws against a Jehovah's Witness whose nine-year-old ward (her niece) helped her to distribute religious literature pursuant to their religious beliefs, the Court made this classic statement:

Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.⁸⁴

Following this reasoning, *Wisconsin v. Yoder*⁸⁵ observed that "the power of the parent, even when linked to a free exercise claim, may be

79. *Smith*, 494 U.S. at 894-95 and cases cited therein (O'Connor, J., concurring in the judgment) ("To say that a person's right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct. . . . Instead, we have respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest.") (citations omitted); *see generally*, *TRIBE*, *supra* note 22, § 16-33, at 1610-13 (discussing in general strict scrutiny of cases involving fundamental rights); *id.* § 14-13, at 1251 (discussing government's burden when claimant demonstrates intrusion on free exercise rights).

80. *See supra* note 23 and accompanying text.

81. *See generally* CLARK, *supra* note 29, § 9.3, at 335-39 (discussing concept as applied to medical decisionmaking, including cases of religiously motivated parental objection to conventional medical care).

82. 321 U.S. 158 (1944).

83. *Id.* at 166-67.

84. *Id.* at 170.

85. 406 U.S. 205 (1972).

subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child”⁸⁶

2. *The Free Exercise Clause Does Not Provide a Defense*

State courts have consistently rejected defenses to criminal actions based on free exercise claims.⁸⁷ Citing *Prince*, the California Supreme Court characterized the lives and health of children as “an interest of unparalleled significance”⁸⁸ and stated, “Regardless of the severity of the religious imposition, the governmental interest is plainly adequate to justify its restrictive effect.”⁸⁹ On that basis, the court upheld the denial of a Christian Scientist’s motion to dismiss charges of involuntary manslaughter and felony child endangerment under circumstances where her four-year-old daughter died of acute meningitis after having been treated solely with prayer.⁹⁰ The court held that neither the Constitution nor the state’s religious exemption statute protected parents whose children’s lives were threatened by serious illness.⁹¹ Similar reasoning has been used countless times by state courts ordering blood transfusions or other medical treatment over parental objections based on religious grounds⁹² and by the United States Supreme Court when placing its imprimatur on universal immunization requirements.⁹³

Definitions of child abuse and neglect are generally regulatory in nature and do not require the endangerment of children’s lives before they become applicable,⁹⁴ but this does not distinguish them from the cited cases. The very premise of an abuse or neglect statute is that parental rights do not encompass certain types of behavior and that parental duties necessarily require others. The reasoning of the cases clearly indicates that when society is dealing with an issue as important as the appropriate definition of child abuse or child neglect, the

86. *Id.* at 233-34.

87. See cases cited *supra* note 67.

88. *Walker v. Superior Court*, 763 P.2d 852, 869 (Cal. 1988), *cert. denied*, 491 U.S. 905 (1989).

89. *Id.* at 870.

90. See David G. Savage, *High Court Permits Prosecution in Faith-Healing Death*, L.A. TIMES, June 20, 1989, at 16; Nat Hentoff, *The Death of a Christian Science Child*, WASH. POST, Dec. 3, 1988, at A25.

91. *Walker*, 763 P.2d at 871 (“The imposition of criminal liability is reserved for the actual loss or endangerment of a child’s life and thus is narrowly tailored to those instances when governmental intrusion is absolutely compelled.”). *Accord* see cases cited *supra* note 9.

92. See cases cited *supra* note 14.

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

94. See *supra* notes 1-2 and accompanying text.

Free Exercise Clause, even when paired with constitutionally protected parental rights, cannot be construed to require an exemption from statutes protecting the health and welfare of children.

3. *The Religious Freedom Restoration Act of 1993 Does Not Change the Outcome: Further Analysis Under the "Compelling Governmental Interest" and "Least Restrictive Means" Tests*⁹⁵

Predicated upon findings that a "neutral" law⁹⁶ may substantially burden free exercise rights⁹⁷ and that *Smith* was wrongly decided,⁹⁸ the Religious Freedom Restoration Act of 1993 specifically restores "the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*"⁹⁹ and provides, in relevant part, as follows:

95. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993). The textual discussion herein assumes the constitutionality of the statute, which may be open to question. The First Amendment, unlike the Thirteenth, Fourteenth, and Fifteenth, contains no enabling clause permitting Congress to carry out its purposes and provisions. See U.S. CONST. amend. XIII, § 2; amend. XIV, § 5; amend. XIV, § 2. Therefore, Congress' attempt to override the Supreme Court's interpretation of religion clause requirements by enacting a more expansive definition of free exercise receives no direct support from such cases as *Oregon v. Mitchell*, 400 U.S. 112 (1970), *Katzenbach v. Morgan*, 384 U.S. 641 (1966), and *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding various provisions of the Voting Rights Act of 1965, although the Act was predicated upon more expansive views of the Fourteenth and Fifteenth Amendments, and provided broader remedies than the Court itself had deemed constitutionally necessary).

96. Elimination of spiritual treatment exemption clauses from child abuse and neglect statutes would, of course, make them "neutral" laws.

97. Pub. L. No. 103-141, § 2(a)(2), 107 Stat. 1488 (1993) ("Laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."); *id.* at § 2(a)(3) ("Governments should not substantially burden religious exercise without compelling justification.").

98. *Id.* at § 2(a)(4) ("In *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion.").

99. *Id.* at § 2(b)(1) (citations omitted). Another purpose is "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." *Id.* at § 2(b)(2). In light of the Act's stated purpose to reinstate the holdings of *Sherbert* and *Yoder*, this discussion assumes that the Act simply restores pre-*Smith* law: *i.e.*, that the Act should not be read more broadly than one would read the holdings of the cases it cites, see *Restore Freedom of Religion*, Editorial, ST. LOUIS POST-DISPATCH, Oct. 27, 1993, at 6B ("That test [the compelling interest test required by the Act] had been in place for many years and had worked well until the Supreme Court weakened it in 1990."). *But see* Bruce Fein, *There's Mischief in This Law*, USA TODAY, Mar. 25, 1993, at 12A ("The Religious Freedom Restoration Act subverts the rule of law by overindulgence of a good thing—freedom of religious practice" and expressing the view that under the broad statute almost any behavior, including crimes, could be excused); Howard A. Peters III, *Caution on Prison Religious Freedom*, CHI. TRIB., Nov. 1, 1993, at Perspective 18 (claiming an earlier editorial had "incorrectly" claimed that restoration of prior law was the Act's only effect and expressing the fear that "[t]he act, if unamended, will place a significant burden on

(a) IN GENERAL.—Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) EXCEPTION.—Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

- (1) is in furtherance of a compelling governmental interest; and
- (2) is the least restrictive means of furthering that compelling governmental interest.¹⁰⁰

As one of the Act's specific purposes is "to provide a claim or defense to persons whose religious exercise is substantially burdened by government,"¹⁰¹ advocates will surely argue that the constitutional interpretation mandated by the statute requires upholding spiritual treatment exemptions. As the Act specifically incorporates the *Yoder* holding,¹⁰² however, resolution of this contention depends upon an interpretation of that case and other consistent decisions. The preceding discussion of free exercise jurisprudence¹⁰³ demonstrates not only the compelling nature of the state's interest in the health and welfare of children but the boundaries placed upon *Yoder's* reach "if it appears that parental decisions will jeopardize the health or safety of the child."¹⁰⁴

While the health and welfare of children may indisputably constitute a "compelling governmental interest," in the words of the Religious Freedom Restoration Act,¹⁰⁵ proponents of spiritual treatment exemption statutes will doubtless argue that total elimination of the accommodation—whether by invalidation under the Constitution or by legislative repeal—fails to meet the Act's standard of "the least restrictive means of furthering that compelling governmental interest."¹⁰⁶ After all, when an individual case demands it, there is the possibility of a governmental check—usually in the form of a judicial order for medical treatment.¹⁰⁷ This practice is expressly stipulated in

correctional operations and interfere with prison officials' ability to protect persons who are housed and work in this dangerous environment.").

100. Pub. L. No. 103-141, §§ 3(a), 3(b)(1)(2), 107 Stat. 1488 (1993).

101. *Id.* at § 2(b)(2).

102. *See supra* note 99 and accompanying text.

103. *See supra* notes 66-94 and accompanying text.

104. *See supra* note 86 and accompanying text.

105. Pub. L. No. 103-141, § 3(b)(1), 107 Stat. 1488 (1993). This standard is required by the Act before government may substantially burden a person's exercise of religion. *See supra* notes 79-86 and accompanying text.

106. Pub. L. No. 103-141, § 3(b)(2).

107. *See supra* note 14 and cases cited therein.

most statutes¹⁰⁸ and, in any event, required by federal regulations.¹⁰⁹ An individualized procedure is surely a less restrictive burden upon religious exercise than is a blanket requirement that those who believe in spiritual treatment alone must provide conventional medical care for their children where a failure to do so by non-religiously motivated parents would be deemed abuse or neglect.

The answer to this contention is simply that individualized mechanisms for protecting children too often do not work. Statistics show that at least forty children in the last decade have died as a result of diseases treatable by conventional medical care.¹¹⁰ It is important to remember that these are only the cases which have come to the attention of courts after discovery by governmental authorities and decisions to prosecute;¹¹¹ surely, there are countless others. Finally, a recital of deaths does not begin to measure the preventable debilitating effects on life-long health suffered by children who do not receive adequate medical care; the numbers involved are matters about which we can only speculate. The total elimination of these exemptions from the statute books, resulting in child abuse and neglect laws of uniform applicability, is the *only* means for protecting the health and welfare of all children.

108. See, e.g., *supra* note 1 and accompanying text; see also statutes cited *supra* note 13.

109. See *supra* note 40 and accompanying text.

110. See *supra* note 6 and accompanying text.

111. District Attorneys may often decline to prosecute. Prosecutions have proven difficult and often unsuccessful because, so long as the exemptions are in place, there are substantial due process arguments in defendants' favor. See cases cited *supra* note 8 (prosecutions disallowed on due process grounds, usually deemed to be lack of notice of criminality of failure to obtain conventional medical care once the child's condition became life-threatening); see also Christine A. Clark, *Religious Accommodation and Criminal Liability*, 17 FLA. ST. U. L. REV. 559, 584 (1990) (statutes fail "to give citizens clear guidelines for legal conduct"); John T. Gathings, Jr., Comment, *When Rights Clash: The Conflict Between a Parent's Right to Free Exercise of Religion Versus His Child's Right to Life*, 19 CUMB. L. REV. 585, 608-14 (1988-89) (statutes would achieve a deterrent effect if they "were amended so as to clearly proscribe the conduct at issue, giving parents the opportunity to be truly informed as to the consequences" of their actions); Gekas, *supra* note 5, at 415-18 (parents must be on notice); Elizabeth R. Koller, Comment, *Walker v. Superior Court: Religious Convictions May Bring Felony Convictions*, 21 PAC. L.J. 1069, 1100-01 (1990) (*Walker* is ambiguous as to when spiritual treatment becomes criminally punishable); Monopoli, *supra* note 3, at 351 (exemptions operate to "thwart justice and endanger children"); Scheiderer, *supra* note 3, at 1441-43 ("Vague laws violate due process rights by chilling the exercise of protected freedoms."); Trahan, *supra* note 4, at 337 & n.238 (statutes "are open to constitutional challenges for vagueness under the Due Process Clause"); Treene, *supra* note 5, at 165-76 (statutory language cannot deprive defendants of notice).

III. Spiritual Treatment Exemptions as Violations of the Establishment Clause

A. The Current Establishment Clause "Tests"

If spiritual treatment exemptions are not required by the Free Exercise Clause or by any likely interpretation of the Religious Freedom Restoration Act, the next logical question is whether they constitute a "law respecting an establishment of religion."¹¹² Several courts have expressed the view that they do.¹¹³ Strong arguments support this position under current Supreme Court jurisprudence, which today revolves principally around the "*Lemon* test" and Justice O'Connor's "endorsement test."¹¹⁴ While finding spiritual treatment exemptions

112. U.S. CONST. amend. I.

113. *Lybarger v. People*, 807 P.2d 570, 575 & n.1 (Colo. 1991) (trial court held *sua sponte* that a spiritual treatment exemption limited to a particular sect violated the Establishment Clause); *State v. McKown*, 475 N.W.2d 63, 69 n.9 (Minn. 1991) (the court found the establishment argument "persuasive," although it decided the case on other grounds); *State v. Miskimens*, 490 N.E.2d 931, 934 (Ohio Ct. Com. Pl. 1984) (prayer treatment exemption violates Establishment Clause); *accord* Trahan, *supra* note 4, at 339 & n.249.

114. This Article does not weigh the issue at hand under Justice Kennedy's proposed third alternative, the "coercion test." *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 660 (1989) (Kennedy, J., joined by Rehnquist, C.J., and White and Scalia, JJ., concurring in the judgment in part and dissenting in part) ("[W]ithout exception we have invalidated actions that further the interests of religion through the coercive power of government The freedom to worship as one pleases without government interference or oppression is the great object of both the Establishment and the Free Exercise Clauses. Barring all attempts to aid religion through government coercion goes far toward attainment of this object."). Conceding that "our recent cases reject the view that coercion is the sole touchstone of an Establishment Clause violation," Justice Kennedy countered that "[t]hat may be true if by 'coercion' is meant *direct* coercion . . ." But by "coercion" he would include indirect behavior that "would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion." *Id.* at 660-61. Although Justice Kennedy spoke for four Justices in his *Allegheny* opinion, his views were vigorously opposed by the other five Justices, whose analysis revolved generally around an "endorsement" concept; *see infra* note 151 and accompanying text; *id.* at 602-13 (Blackmun, J., in an opinion of the Court) (finding that "Justice Kennedy's reasons [for a differing analysis] . . . are so far reaching in their implications that they require a response in some depth," and noting that "Justice Kennedy's effort to abandon the 'endorsement' inquiry in favor of his 'proselytization' test seems nothing more than an attempt to lower considerably the level of scrutiny in Establishment Clause cases," and characterizing Justice Kennedy's analysis as "flawed at its foundation"); *id.* at 627-28 (O'Connor, J., joined by Brennan and Stevens, JJ., concurring in part and concurring in the judgment) ("An Establishment Clause standard that prohibits only 'coercive' practices or overt efforts at government proselytization, but fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community.") (citation omitted); *see also id.* at 650 n.6 (Stevens, J., joined by Brennan and Marshall, JJ., concurring in part and dissenting in part) ("Justice Kennedy's preferred 'coercion' test . . . is, as he himself admits, out of step with

to be violations of the Establishment Clause under either test, this Part suggests that the tests themselves are unsatisfactory measures for evaluating a religious exemption from an otherwise generally applicable regulation.

B. The *Lemon* Test

Although much maligned by both scholars¹¹⁵ and the Justices themselves,¹¹⁶ and apparently scheduled for re-examination this

our precedent.”) (citing and quoting *Engel v. Vitale*, 370 U.S. 421, 430 (1962)). In *Lee v. Weisman*, 112 S. Ct. 2649 (1992), Justice Kennedy, for the Court, invalidated the practice of prayer at public school graduations on the basis of the *Lemon* test, *see infra* notes 118-19 and accompanying text, specifically noting, “It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise” *Id.* at 2655. He was joined by Justices Blackmun, Stevens, O’Connor, and Souter. In a separate opinion, Justice Blackmun, joined by Justices Stevens and O’Connor, took pains to note that “[t]he Court repeatedly has recognized that a violation of the Establishment Clause is not predicated on coercion,” *id.* at 2665, and to reiterate the Establishment Clause’s prohibition against “endorsement,” *id.* at 2667. Justice Souter, joined by Justices Stevens and O’Connor, followed suit with an elaborate analysis of why “coercion” is an insufficient test for Establishment Clause analysis, *id.* at 2671-76, and an explication of permissible accommodation which relied heavily on “endorsement” concepts, *id.* at 2676-78. Thus, the “coercion” test has never gained the support of a majority of the Court and appears unlikely to do so, particularly given the retirement of Justice White and the appointment of Justice Ginsburg.

115. Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 450 (1986) (*Lemon* is “[s]o elastic in its application that it means everything and nothing”); Douglas Laycock, *Towards a General Theory of Establishment Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1380-1402 (1981) (criticizing second and third prongs of *Lemon*); Ira C. Lupu, *Keeping the Faith: Religion, Equality, and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739, 744-45 (1986) (*Lemon* test limits legitimate government interests); Lupu, *Trouble*, *supra* note 57, at 762 (*Lemon*’s reign “is about to end”); *id.* at 762 n.87 (“Academic commentators have been [persuasively] excoriating *Lemon* for years. . . .”); Michael W. McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 118-19 (1992) (the “aptly named *Lemon*” doctrine is in “chaos”); Paulsen, *supra* note 49, at 315-17 (case law is inconsistent with *Lemon* test); Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court’s Approach*, 72 CORNELL L. REV. 905, 908-35 (1987) (criticizing all three prongs of *Lemon*); MONSMA, *supra* note 65, at 29 (Court has not consistently applied *Lemon*); *see generally* Ronald Y. Mykkeltvedt, *Souring on Lemon: The Supreme Court’s Establishment Clause Doctrine in Transition*, 44 MERCER L. REV. 881 (1993).

116. *See Allegheny*, 492 U.S. at 655-56 (Kennedy, J., dissenting) (“Persuasive criticism of *Lemon* has emerged.”) (citing *Edwards v. Aguillard*, 482 U.S. 578, 636-40 (1987) (Scalia, J., dissenting)); *Aguilar v. Felton*, 473 U.S. 402, 426-30 (1985) (O’Connor, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 108-13 (1985) (Rehnquist, J., dissenting); *Roemer v. Maryland Bd. of Pub. Works*, 426 U.S. 736, 768-69 (1976) (White, J., concurring in judgment); *see also Allegheny*, 492 U.S. at 656 (“[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area.”) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984)). Although he found *Lemon* satisfactory for his *Alle-*

term,¹¹⁷ the three-part test from *Lemon v. Kurtzman*¹¹⁸ remains the Court's dominant model for determining whether the Establishment Clause has been violated: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"¹¹⁹

1. Purpose

Any governmental accommodation directed exclusively to the benefit of religious actors poses obvious problems for the purpose prong of the *Lemon* test. Justice White acknowledged this dilemma in *Corporation of the Presiding Bishop v. Amos*,¹²⁰ which upheld the exemption of religious employers from Title VII's religious nondiscrimination provision. Nonetheless, he declared the exemption "in no way questionable under the *Lemon* analysis."¹²¹ His opinion for the Court found that under *Lemon* it was a permissible legislative purpose "to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."¹²² Presumably, a statute whose purpose was to alleviate significant governmental interference with the ability of individual religious actors to follow their religious precepts would also pass muster under *Lemon*.

2. Effects

It is the second *Lemon* prong, the "primary effects test," that presents the greatest problems for accommodations aimed exclusively at religious actors. In *Amos*, Justice White explained away the prob-

gheny analysis, Justice Kennedy conceded that "[s]ubstantial revision of our Establishment Clause doctrine may be in order . . ." *Id.* at 656.

117. *Grumet v. Board of Educ. of Kiryas Joel Village Sch. Dist.*, 618 N.E.2d 94, (N.Y. Ct. App. 1993), *cert. granted sub nom.* Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 62 U.S.L.W. 3368 (Nov. 30, 1993), specifically raises the question of whether the *Lemon* test should be overruled; *see also* Linda Greenhouse, *Justices Will Hear Church-State Case Involving Hasidim*, N.Y. TIMES, Nov. 30, 1993, at A1 (noting, however, that the Justices will not "necessarily accept" the invitation to "rewrite the constitutional law of church and state"). The case challenges a New York statute creating a public school district coterminous with an enclave of Hasidic Jews in order to provide handicapped school children with public educational services when their parents refused on religious grounds to send their children to surrounding schools in order to obtain the benefits. Relying on the *Lemon* test as interpreted by "endorsement" concepts, the New York State Court of Appeals declared the law unconstitutional.

118. 403 U.S. 602 (1971).

119. *Id.* at 612-13 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

120. 483 U.S. 327 (1987).

121. *Id.* at 335.

122. *Id.*

lem by stating that “[f]or a law to have forbidden ‘effects’ under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence.”¹²³ He cited *Walz v. Tax Commission*¹²⁴ for the proposition that, to the Framers, “‘establishment’ of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.”¹²⁵ Other Justices were more cognizant of the advancement of religion effected by the religious exemption in *Amos*, but concurred in the judgment on the grounds that a different policy would have a chilling effect on free exercise activity¹²⁶ or that the government policy stopped short of “endorsement.”¹²⁷

Spiritual treatment exemptions to child neglect laws obviously provide a benefit to religious actors that is unavailable to others, thereby preferring religion over nonreligion. Indeed, they benefit one particular religious viewpoint—that spiritual treatment alone is a sufficient means of healing physical ailment. Although some Establishment Clause cases imply that either of these kinds of preferences is sufficient to invalidate governmental action,¹²⁸ *Amos* and other cases indicate that this is not necessarily so, at least not when government

123. *Id.* at 337.

124. 397 U.S. 664 (1970).

125. *Amos*, 483 U.S. at 337 (quoting *Walz*, 397 U.S. at 668).

126. *Id.* at 343 (Brennan, J., concurring in the judgment).

127. *Id.* at 347 (O'Connor, J., concurring in the judgment) (noting “‘by definition, such legislation has a religious purpose and effect in promoting the free exercise of religion’”) (quoting her own concurrence in the judgment in *Wallace v. Jaffree*, 472 U.S. 38, 82 (1985) and stating that the question should be “‘whether government’s purpose is to endorse religion and whether the statute actually conveys a message of endorsement’”); *id.* at 348 (quoting her opinion in *Wallace*, 472 U.S. at 69). For a discussion of the “endorsement” test, see *infra* notes 147-72 and accompanying text. Justice Blackmun essentially agreed with Justice O'Connor’s position. *Amos*, 483 U.S. at 346 (Blackmun, J., concurring in the judgment).

128. See, e.g., *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 644 (1989) (Brennan, J., concurring in part and dissenting in part) (“We have . . . interpreted . . . [the Establishment] Clause to require neutrality, not just among religions, but between religion and nonreligion.”); *Wallace*, 472 U.S. at 52-53 (“[T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.”); *Larson v. Valente*, 456 U.S. 228, 244 (1982) (“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”); *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947) (“The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.”).

policy itself has imposed a burden on religiously motivated behavior.¹²⁹

Unfortunately, the Supreme Court has never defined "primary effect" in any meaningful manner, although Justice O'Connor's "endorsement" concept, discussed below,¹³⁰ represents an attempt to do so. Some cases, particularly those involving public aid to religiously affiliated schools, suggest a quantitative kind of perspective: "too much" aid, even though nonsectarian in nature, helps the sectarian enterprise as a whole, thereby producing a forbidden primary effect.¹³¹ Other cases focus more specifically on the quality of the government action in evaluating its primary effect: they often decry a "symbolic link" between church and state or an "imprimatur of approval" by government action on a religious message.¹³² With respect to spiritual treatment exemption statutes, both perspectives apply.

The unconstitutional effect of these laws does not necessarily lie in their potential for forcing upon minor children their parents' religious *views*, for that activity receives at least some degree of support from parental rights to educate minor children.¹³³ The forbidden effect may not even lie in the operation of these exemptions to force minor children to practice some aspects of their parents' religion. The

129. See *infra* notes 180-90 and accompanying text (discussing cases of permissible accommodations to religious actors); see also *TRIBE*, *supra* note 22, § 14-7, at 1193 ("One can say with . . . confidence that *Larson's* neutrality principle does not extend to cases where the state's denominational line is based on free exercise values.").

130. See *infra* notes 147-76 and accompanying text.

131. See, e.g., *Aguilar v. Felton*, 473 U.S. 402, 417-18 (1985) (Powell, J., concurring) ("[B]y directly assuming part of the parochial schools' education function, the effect of the . . . aid is 'inevitably . . . to subsidize and advance the religious mission of [the] sectarian schools' even though the program provides that only secular subjects will be taught.") (quoting *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 779-80 (1973)); *Meek v. Pittenger*, 421 U.S. 349, 366 (1975) ("Substantial aid to the educational function of such schools . . . necessarily results in aid to the sectarian school enterprise as a whole."); cf. *Committee for Pub. Educ. and Religious Liberty v. Regan*, 444 U.S. 646, 658 (1980) ("The Court 'has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends.") (quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973)).

132. See, e.g., *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985) ("The symbolism of a union between church and state is most likely to influence children of tender years . . ."); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125-26 (1982) ("[T]he mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some."); cf. *Widmar v. Vincent*, 454 U.S. 263, 274 (1981) ("[A]n open forum in a public university does not confer any imprimatur of state approval on religious sects or practices.").

133. See *supra* notes 75-77 and accompanying text, and *infra* notes 267-70 and accompanying text (discussing rights of parents to bring up and educate their children as they see fit).

reasoning of cases like *Wisconsin v. Yoder*¹³⁴ might well support parents' rights to compel their minor children (at least those who are very young) to attend church, engage in supervised religious study, or abstain from dancing or other behavior considered sinful according to the parents' religious tenets. Rather, the unconstitutional effect of these exemptions lies in the fact that their operation forces upon minor children religious practices which may have extremely debilitating effects upon their lives and health that cannot be undone or overcome when the children reach maturity and can make their own religious choices. As a quantitative matter, the impact on those affected by the statutes is frequently severe and sometimes permanent. From the qualitative perspective, the effect is achieved by the government's elevation of the religious practices of certain adults over interests normally deemed compelling—the lives and welfare of children.¹³⁵ In the process, children's constitutionally protected free exercise and equal protection rights are ignored.¹³⁶ Recall the Court's statement in *Prince v. Massachusetts*: "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children"¹³⁷ Any law which specifically authorizes parents to violate this basic principle in the name of religious freedom has a primary effect which, under the classic *Lemon* analysis, is offensive to the Establishment Clause.¹³⁸

3. Entanglement

The third *Lemon* prong is the "entanglement" test, which invalidates policies requiring a high degree of interaction between government and religious institutions or actors.¹³⁹ Some state courts have

134. 406 U.S. 205 (1971).

135. See *supra* notes 80-93 and accompanying text.

136. See *infra* notes 237-50 and accompanying text (arguing that exemption statutes trample on children's free exercise rights); see also *infra* notes 251-66 and accompanying text (arguing that exemption statutes violate children's rights to equal protection of the laws).

137. 321 U.S. 158, 170 (1944); see also *supra* notes 82-86 and accompanying text.

138. Note that the *Prince* principle anticipates and overcomes the counterargument pertaining to the chilling effect on the parents' free exercise rights, thereby obviating the grounds upon which Justice Brennan concurred in the judgment in *Amos*. See *supra* note 126 and accompanying text; see also *supra* notes 80-93 and accompanying text (discussing the state's compelling interest in the health and welfare of children).

139. See, e.g., *Aguilar v. Felton*, 473 U.S. 402 (1985) (invalidating New York's program of sending Title I teachers into religiously affiliated schools on the basis of the extensive monitoring required to assure that they would not become intertwined with the schools' religious messages); *Meek v. Pittenger*, 421 U.S. 349 (1975) (striking down public provision of auxiliary school supplies, such as audio-visual equipment, to religiously affiliated

expressed entanglement concerns where the relevant statutes exempted spiritual treatment provided by members of a "recognized church,"¹⁴⁰ conducted "in accordance with the tenets of [that] recognized" group¹⁴¹ or under the care of a "duly accredited practitioner."¹⁴²

While a law phrased in general terms, along the lines of the original HEW regulation,¹⁴³ avoids the obvious pitfalls of denominational preference or inquiry into religious "accreditation," it encounters a similar, but subtler, "entanglement" trap. Those who practice spiritual treatment alone may claim that they have met the law's requirement of "adequate medical care" for their children; they simply

schools, partly on the grounds that insuring their use for only secular instruction would require too much monitoring).

140. *State v. Miskimens*, 490 N.E.2d 931, 934 (Ohio Ct. Com. Pl. 1984) (invalidating on establishment clause grounds an exemption for parents providing prayer treatment alone "in accordance with the tenets of a recognized religious body," noting the government intrusion raised by questions "such as what is a 'recognized' religious body, by whom must it be 'recognized,' for how long must it have been 'recognized,' what are its tenets, did the accused act in accordance with those tenets, what are 'spiritual means,' and what is the effect of combining some prayer with some treatment or medicine"); *see also* *Walker v. Superior Court*, 763 P.2d 852, 877 (Cal. 1988) (Mosk, J., concurring, expressing the view that California's statute violated the Establishment Clause and noting specifically "the troubling entanglement of church and state" required by statutory language similar to the Ohio law).

141. *See* COLO. REV. STAT. § 18-6-401 (Supp. 1992); COLO. REV. STAT. § 19-3-103(1) (Supp. 1992); IOWA ADMIN. CODE r. 18.2-371.1(c) (1993); KAN. STAT. ANN. § 21-3608(1)(c) (1988); LA. REV. STAT. ANN. § 403(B)(4) (West 1986); N.H. REV. STAT. § 639:3(IV) (1986); OHIO REV. CODE ANN. § 2919.22(A) (Baldwin 1992); OKLA. STAT. ANN. tit. 21, § 852 (West Supp. 1993); VA. CODE ANN. § 16-1-228(2) (Michie 1988); VA. CODE ANN. § 18.2-371.1(c) (Michie Supp. 1993); W. VA. CODE § 49-7-7(c) (1992). Two state statutes substitute "organized" for "recognized": DEL. CODE ANN. tit. 11, § 1104 (1974); N.Y. PENAL LAW § 260.15 (McKinney 1989).

142. *See* ALA. CODE § 13A-13-6 (1982); ALASKA STAT. § 11.51.120(b) (1992); ARK. CODE ANN. § 5-27-221(4)(c) (Michie 1987); ARK. CODE ANN. § 9-30-103(5)(B) (Michie 1991); CAL. PENAL CODE § 270 (West 1993); CAL. WELF. & INST. CODE § 300.5 (West 1984); D.C. CODE ANN. § 2-1356 (1988); D.C. CODE ANN. § 16-2301(8)(f) (1988); FLA. STAT. ANN. § 415.503(9)(f) (West 1993); GA. CODE ANN. § 15-11-2(8)(D) (Supp. 1993); ME. REV. STAT. ANN. tit. 22, § 4010(1), (2) (West Supp. 1992); MASS. GEN. LAWS ANN. ch. 273 § 1(4) (West 1990); MISS. CODE ANN. § 43-21-105(1)(i), (m) (Supp. 1992); N.H. REV. STAT. ANN. § 169-C:3(xix)(c) (1990); N.J. STAT. ANN. § 9:6-8.21(c) (West 1993); N.M. STAT. ANN. § 32-1-3(L)(5), (M)(4) (Michie Supp. 1992); 23 PA. CONS. STAT. ANN. § 6303 (Supp. 1991); WYO. STAT. § 14-3-202(a)(vii) (Supp. 1992).

The statutes of four jurisdictions specifically exempt only Christian Science treatment administered by a duly accredited Christian Science practitioner. ARIZ. REV. STAT. ANN. § 8-201.01 (1989); ARIZ. REV. STAT. ANN. § 8-531.01 (1989); ARIZ. REV. STAT. ANN. § 8-546(B) (Supp. 1992); CONN. GEN. STAT. ANN. § 17a-104 (West 1992); CONN. GEN. STAT. § 46b-120 (1993); VA. CODE ANN. § 18.2-314 (Michie 1988); WASH. REV. CODE § 26.44.020(3) (1993).

143. *See supra* note 36 and accompanying text.

provide a different *kind* of medical care—not conventional medical care, perhaps, but medical care (or, at least, “health care”) nonetheless.¹⁴⁴ They may be willing to offer empirical evidence concerning the effectiveness of their techniques.¹⁴⁵ Yet one enduring principle in the murky area of Establishment Clause jurisprudence is that government may not inquire into the truth of any religious belief.¹⁴⁶ Whether or not the “entanglement” prong of *Lemon* survives, it would clearly be unacceptable for a court to delve into the efficacy of spiritual healing as a means of meeting a statutory requirement of “adequate medical care.”

C. The “Endorsement” Test

A number of commentators¹⁴⁷ and most of the Justices¹⁴⁸ have expressed dissatisfaction with the *Lemon* test, which is obviously ill-suited to intelligent evaluation of accommodations directed exclusively to religious actors. Justice O’Connor’s modification of *Lemon*—her “endorsement test”—has drawn increasing attention from both quarters¹⁴⁹ and appears to be a likely point of coalescence

144. See, e.g., Nathan A. Talbot, *Government Should Not Interfere With Personal Beliefs*, in FREEDOM AND RESPONSIBILITY: CHRISTIAN SCIENCE HEALING FOR CHILDREN 7-10 (1989). This book, consisting of a collection of essays on various aspects of the Christian Science position, makes clear that, to members of that group, spiritual healing is “health care” and is demonstrably effective.

145. See Andrew Skolnick, *Christian Scientists Claim Healing Efficacy Equal if Not Superior to That of Medicine*, 264 JAMA 1379 (1990) (reporting on Christian Scientists trying to convince legislatures that the church’s form of healing is at least as effective as medicine); *Appendix: An Empirical Analysis of Medical Evidence in Christian Science Testimonies of Healing, 1969-1988*, in FREEDOM AND RESPONSIBILITY: *supra* note 144, at 110-26.

146. *United States v. Ballard*, 322 U.S. 78 (1944); see also *Thomas v. Review Bd., Ind. Empl. Sec. Div.*, 450 U.S. 707, 714 (1981).

147. See *supra* note 115 and accompanying text.

148. See *supra* note 116 and accompanying text.

149. See, e.g., *Lee v. Weisman*, 112 S. Ct. 2649, 2664-67 (1992) (Blackmun, J., joined by Stevens and O’Connor, JJ., concurring); *id.* at 2676-78 (Souter, J., joined by Stevens and O’Connor, JJ., concurring); *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 589-94 (opinion of the Court based on the “endorsement” concept); *id.* at 623-32 (O’Connor, J., concurring in part and concurring in the judgment); *id.* at 637 (Brennan, J., joined by Marshall and Stevens, JJ., concurring in part and dissenting in part); *id.* at 650 n.6 (Stevens, J., joined by Brennan and Marshall, JJ., concurring in part and dissenting in part); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 389 (1985) (if the “effect” of a government program “conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated”) (citations omitted); see also Donald L. Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O’Connor*, 62 NOTRE DAME L. REV. 151, 152 (1987) (proposing that endorsement approach be used to develop concept of liberal neutrality); Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Estab-*

as the *Lemon* test comes up for re-consideration.¹⁵⁰ Concurring in the judgment in *Amos*, Justice O'Connor noted the inherent deficiencies of *Lemon* for answering a religious accommodation question and elaborated upon her previously announced proposal:

The necessary first step in evaluating an Establishment Clause challenge to a government action lifting from religious organizations a generally applicable regulatory burden is to recognize that such government action *does* have the effect of advancing religion. The necessary second step is to separate those benefits to religion that constitutionally accommodate the free exercise of religion from those that provide unjustifiable awards of assistance to religious organizations. As I have suggested in earlier opinions, the inquiry framed by the *Lemon* test should be "whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement." To ascertain whether the statute conveys a message of endorsement, the relevant issue is how it would be perceived by an objective observer, acquainted with the text, legislative history, and implementation of the statute.¹⁵¹

Presumably, concepts applicable to "religious organizations" are equally valid for all religiously motivated actors.

Under O'Connor's approach, the relevant questions here are, first, "whether government's purpose is to endorse religion," and second, whether a spiritual treatment exemption "would be perceived by an objective observer, acquainted with the text, legislative history, and implementation of the statute" to "convey a message of endorsement."¹⁵² With respect to religious exemptions to child abuse and neglect statutes, the answer to the question of governmental purpose is arguably the same as under the *Lemon* analysis: the alleviation of a

lishment Clause: The Untapped Potential of Justice O'Connor's Insight, 64 N.C. L. REV. 1049 (1986) (advocating adoption of the endorsement test to define government neutrality); William P. Marshall, "We Know it When we See it": *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 498 (1986) (same); Lawrence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 610-11 (1985). But see McConnell, *supra* note 115, at 148 ("endorsement test is not an attractive alternative" to *Lemon*); see also *infra* note 176 and accompanying text.

150. See Beschle, *supra* note 149, at 152 (discussing why O'Connor's endorsement position is "preferable to present law"); Gey, *supra* note 55, at 111-19 (endorsement test may gain support of accommodationist Justices and has been adopted by the separationists); Lupu, *Trouble*, *supra* note 57, at 762 (noting that even Justices Blackmun and Stevens, steadfast adherents to *Lemon*, "have drifted toward Justice O'Connor's 'endorsement' approach"); see also cases cited *supra* note 149.

151. *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 348 (1987) (citations omitted); see also *Allegheny*, 492 U.S. at 627-32 (O'Connor, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 69-70, 76 (1985) (O'Connor, J., concurring in the judgment); *Lynch v. Donnelly*, 465 U.S. 668, 687-89 (1984) (O'Connor, J., concurring).

152. *Amos*, 483 U.S. at 348.

government-imposed burden on a religious practice does not, without more, necessarily reveal an illicit purpose to endorse that practice. Strong arguments, however, support an affirmative answer to the question of whether the accommodation at issue conveys a message of endorsement to “an objective observer, acquainted with the text, legislative history, and implementation of the statute.”¹⁵³

The text of child abuse and neglect statutes which contain spiritual treatment exemptions¹⁵⁴ reveals a plain purpose to protect the welfare of children.¹⁵⁵ This goal is achieved by requiring the primary caretakers of minor children (parents or guardians) to provide them with “adequate food, clothing, shelter [and] medical care.”¹⁵⁶ Yet the exemption provides that with respect to one such necessary, medical care, a parent may opt out of the requirement—or, rather, may substitute spiritual treatment—if religious motivation underlies the choice. The only check on the parent’s potentially abusive or neglectful behavior is the stipulation that a court may override the parental decision in the interests of the child’s health¹⁵⁷—a check that will not work if the child’s condition is not brought to a court’s attention.

Two aspects of the typical exemption immediately stand out. First, it directly undercuts the statute’s primary purpose of protecting the health and welfare of children, for the accommodation virtually *ensures* that some group of children will not receive the adequate medical care that the legislature deems necessary to serve its goal. Exemptions from generally applicable regulations that have passed constitutional muster or been cited with tacit court approval do not have this effect.¹⁵⁸ A spiritual treatment exemption to a child abuse/

153. *Id.*

154. *See supra* notes 1-2 and accompanying text.

155. *See supra* notes 33-34 and accompanying text (discussing Congressional purpose behind the Child Abuse Prevention and Treatment Act and its amendments).

156. 45 C.F.R. § 1340.2(d)(2)(i) (1992); *see also* statutes cited *supra* notes 1-2 and *supra* notes 33-38 and accompanying text (discussing Child Abuse Prevention and Treatment Act).

157. *See* statutes cited *supra* note 13 and accompanying text; *see also supra* notes 36-40 and accompanying text (discussing federal requirement).

158. For example, tax exemptions for religious institutions (invariably only one kind of beneficiary of the relevant exemption statute) do not hinder the government’s goal of obtaining sufficient revenues; they merely eliminate one potential source of revenue collection, while preserving a desirable separation between religious and governmental institutions; *see, e.g.,* *Walz v. Tax Comm’n*, 397 U.S. 664, 676 (1970). A law exempting conscientious objectors from military service does not undermine Congress’ overall purpose of raising an effective army; it actually serves that purpose, as such persons may be of questionable value as fighting troops. *See Welsh v. United States*, 398 U.S. 333, 369 (1970) (White, J., dissenting). Statutes permitting the sacramental use of peyote do not hinder government’s efforts to stop illegal drug trafficking, as peyote is not a commonly sought

neglect statute, directly undercutting the primary purpose of the larger governmental goal, conveys to an "objective observer" a message of governmental endorsement of religion under Justice O'Connor's definition.

A second striking aspect of the exemption is that it preserves the rights of one party at the expense of another. The parent or guardian of a minor child, who receives the benefits of the exemption, is not the person most directly affected by its operation. That person is the child, whose own religious rights are ignored in the name of her parent's religious freedom and whose health and welfare may be severely harmed. Other exemptions do not work this way.¹⁵⁹ A legislative enactment that puts the imprimatur of the state behind religious choices made by one person but imposed upon another necessarily sends a message of endorsement to Justice O'Connor's "objective ob-

recreational drug, and the permitted use is narrowly constricted; see *Employment Div. v. Smith*, 494 U.S. 872, 911-16 (1990) (Blackmun, J., dissenting). In addition, the federal exemption for the sacramental use of peyote in the Native American Church, 21 C.F.R. § 1307.31 (1990), aids the government's overall purpose of preserving the heritage and ways of life of Native Americans, in many ways threatened in the modern context; see 42 U.S.C. § 1996 (1988) ("protection and preservation of traditional religions of Native Americans"); 25 U.S.C.A. §§ 2901-2905 (West Supp. 1993) (Native American Languages Act). The Social Security exemption for self-employed Amish does not undermine the federal program, as the affected group does not receive benefits from the system. 26 U.S.C. § 1402(g) (1988). The exemption for religious employers from the religious nondiscrimination requirements of Title VII with respect to the institutions' nonprofit activities is perhaps a closer call, but on balance it does not undermine the government's purpose to eliminate invidious discrimination in the workplace; rather, as in *Amos*, it promotes the freedom of religious employers to define their own identities and missions. *Amos*, 483 U.S. at 339; see *infra* notes 180-90 and accompanying text for a more general discussion of government accommodations which have received explicit or tacit Court approval. Although *Wisconsin v. Yoder*, 406 U.S. 205 (1972), is not directly on point here, involving as it did a Court-fashioned exemption (hence there is no statutory "text" to analyze), it is noteworthy that the case included a specific finding that permitting Amish parents to withdraw their children from school after eighth grade did not undermine the state's important interest in developing an educated and productive citizenry; to the contrary, the continuing training that Amish children received at home would instill in them skills and values that would serve them well not only in their own community but also in the larger society, should they choose to leave the Amish enclave.

159. For example, in *United States v. Lee*, 455 U.S. 252 (1982), the Supreme Court held that an Amish employer (exempt from the payment of Social Security taxes for himself) could not refuse to pay Social Security taxes for his employees, even though they were also Amish. The exemption applied only to the self-employed, and their religious beliefs could not form a legitimate basis for regulating the activities of others. The Court specifically noted, "[g]ranting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees." *Id.* at 261. Similarly, every other statutory exemption applies only to the choices that the religious actor makes for himself or herself.

server."¹⁶⁰ This is true notwithstanding the parent/child relationship, for the child's own religious and equal protection rights are so obviously ignored¹⁶¹ and the child's interest in adequate medical care so severely undercut.¹⁶²

The legislative history of these laws buttresses the appearance of governmental endorsement. Largely the result of lobbying by affected groups,¹⁶³ the statutes were not adopted by many states¹⁶⁴ until a federal regulation forced the issue, using Congressional purse-strings.¹⁶⁵ Although the federal regulation has been withdrawn and many concerned groups and citizens have called for repeal of the exemptions,¹⁶⁶ HHS stopped short of requiring repeal, and most states have left the laws in place.¹⁶⁷ Continuation of a legislative policy favoring religion, which has demonstrably harmed the children whose

160. *Yoder* is the only accommodation which provides any kind of parallel to the issues under discussion here. There, however, the children affected by the Court-fashioned policy were old enough to entertain their own views on the issue; the only evidence before the Court on the matter was from a girl who agreed with her parents' choice; and affected children who later left the Amish community could doubtless overcome any educational deficiencies they might feel. Nonetheless, Justice Douglas's views cogently point to arguable flaws in the holding. See *infra* notes 247-50 and accompanying text (discussing why his dissent applies with greater urgency to spiritual treatment exemption statutes).

161. See *infra* notes 237-66 and accompanying text.

162. See *supra* note 6 and accompanying text.

163. See SWAN, LAW'S RESPONSE, *supra* note 4, at 26-27 (claiming that the first HEW regulation, requiring states to adopt the exemption in order to be eligible for federal funding, came about after a request from the Christian Science Church); *supra* notes 32-45 and accompanying text (discussing legislative history); see also Gathings, *supra* note 111, at 588 (noting arguments made by faith healing parents); Monopoli, *supra* note 3, at 331 & n.63 (citing the lobbying efforts of the Christian Science Church to include spiritual healing exemptions from federal child abuse/neglect laws); Skolnick, *supra* note 145, at 1379 (noting that "the Christian Science Church is trying to persuade state legislatures that its particular form of healing by prayer is at least as effective as medicine"); RITA SWAN, MEMORANDUM TO U.S. ADVISORY BOARD ON CHILD ABUSE AND NEGLECT, RE: FEDERAL POLICY ON RELIGIOUS EXEMPTIONS FROM CHILD HEALTH CARE LAWS 1 (1993) (stating that after the 1974 HEW regulation was passed, "the federal push was coordinated with Christian Science church lobbying at the state level. . .").

164. See *supra* note 32 and accompanying text (noting that only eleven states had such exemptions prior to adoption of the HEW requirement).

165. See *supra* notes 35-36 and accompanying text (discussing the federal regulation).

166. See *supra* notes 3, 12 and accompanying text; see also *Effort Seeks to Force Child Medical Care Regardless of Beliefs*, L.A. TIMES, Nov. 27, 1993, at B4 (noting increased efforts by various groups urging repeal, including the National Center for Prosecution of Child Abuse, a wing of the National District Attorney's Association, and citing attempts at legislative repeal in Iowa, Minnesota, Missouri, Maryland, Delaware, and Kentucky).

167. See *supra* notes 40-45 and accompanying text (detailing the legislative history and the states' response).

health is supposed to be protected,¹⁶⁸ certainly sends a message of endorsement to this “objective observer.”

After text and legislative history, the third element Justice O'Connor would consider is the implementation of the statute.¹⁶⁹ Here again, the available statistics of harm to the welfare of substantial numbers of children,¹⁷⁰ together with the due process problems pinpointed by appellate courts when parental behavior in reliance on the exemptions has led to children's deaths,¹⁷¹ amply demonstrate both the chaos created by these exemptions and their failure to protect adequately the health and welfare of children—the primary goal of child abuse/neglect legislation. Inconsistencies in case outcomes in situations where children's severe conditions are discovered in time to employ the judicial check on parental behavior further manifest the laws' inadequacies.¹⁷² These situations obtain as a direct result of governmental permission for parents to force their own religious practices on their children. The implementation of these exemptions cannot help but “convey a message of endorsement” to any “objective observer.”

D. The Inadequacies of Current “Tests”

The *Lemon* test has probably been most successful—or at least received its most consistent application—as a measure for the validity of government benefits to religiously affiliated schools or to those attending them.¹⁷³ It has been much less satisfactory (and sometimes abandoned altogether) in other contexts.¹⁷⁴ As Justice O'Connor

168. See *supra* note 6 and accompanying text (containing statistics on prosecutions of children who have died or barely survived life-threatening situations when their parents chose spiritual treatment alone for their medical care).

169. See *supra* note 151 and accompanying text.

170. See *supra* note 6 and accompanying text.

171. See *supra* note 8 and accompanying text.

172. See *supra* note 15 and accompanying text.

173. See, e.g., *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993) (upholding public provision of sign language interpreter for student attending sectarian school); *Witers v. Washington Dept. of Serv. for the Blind*, 474 U.S. 481 (1986) (upholding public grant to blind theology student whose handicap made him eligible); *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding income tax deductions for parents for certain school expenses, including private school tuition); *Meek v. Pittenger*, 421 U.S. 349 (1975) (striking down public provision of audio-visual equipment, maps, globes, and other educational aids to sectarian schools); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973) (invalidating money grants to sectarian schools and tuition reimbursements to students' parents); *Levitt v. Committee for Pub. Educ. (Levitt I)*, 413 U.S. 472 (1973) (invalidating public funding for the administration and grading of certain tests and examinations in sectarian schools).

174. See *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding legislature's hiring of chaplain to open sessions with prayer, based on notions of history and tradition); see also

pointed out in her *Amos* concurrence, it does not work conceptually for accommodations to religiously motivated behavior.¹⁷⁵ On the other hand, critics justifiably characterize O'Connor's modification, the "endorsement test," as devoid of specific content and therefore manipulable.¹⁷⁶ Thus, while there are strong arguments under each test to invalidate spiritual treatment exemption statutes pursuant to the Establishment Clause, inadequacies in the tests themselves suggest the desirability of a new framework. To answer the question of whether any governmental accommodation to religiously motivated behavior not specifically required by the Free Exercise Clause or by the Religious Freedom Restoration Act is permissible or impermissible under the Establishment Clause, we should look elsewhere.

IV. The Zone of Permissible Accommodation

A. The Chaos of Current Law

"The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause."¹⁷⁷ Although, as noted, some commentators argue vigorously that so-called "permissible accommodations" are indefensible, either on constitutional or policy grounds,¹⁷⁸ the Court has continued to sanction what Professor Laurence Tribe characterizes as a "zone of permissible accommodation"¹⁷⁹—accommodations to religious institutions or to individuals motivated by religious convictions. In each situation, it is clear that the Free Exercise Clause does not demand the accommodation, but the Establishment Clause also does not prohibit it.

Lynch v. Donnelly, 465 U.S. 668 (1984) (upholding presence of creche as part of large and varied public holiday display, purporting to apply *Lemon* but also downplaying the importance of the test and largely relying on historical examples of approved accommodation).

175. See *supra* note 151 and accompanying text.

176. See *Gey*, *supra* note 55, at 113 (there is "an almost unlimited malleability" to the endorsement test); *id.* at 119 ("The test is so malleable that it can mean anything; the results depend on the policy presumptions that are plugged into the objective observer's calculus."); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 301 (1987) (an endorsement test would "not provide clarity or predictability to establishment jurisprudence"); *id.* at 325 (the concept of neutrality used in endorsement analysis "appears to be both irresistible and yet so indeterminate as to be almost meaningless"); Tushnet, *supra* note 47, at 397 (arguing that the "no endorsement" test "may simply be incoherent").

177. *Walz v. Tax Comm'n*, 397 U.S. 664, 672-73 (1970) (upholding, against Establishment Clause challenge, property tax exemptions to religious organizations for religious properties).

178. See *supra* notes 47-52, 59 and accompanying text.

179. TRIBE, *supra* note 22, § 14-7 at 1194.

Thus, the Court has specifically upheld exemptions of conscientious objectors from military service;¹⁸⁰ property tax exemptions for religious organizations with respect to their religious properties;¹⁸¹ and exemptions of religious employers from the religious nondiscrimination requirements of Title VII, even with respect to the organizations' secular nonprofit activities.¹⁸² It has apparently approved of statutory exemptions permitting the ritual use of peyote,¹⁸³ exemptions of self-employed Amish from Social Security taxes,¹⁸⁴ and exemptions from Sunday closing laws for those whose religion requires them not to work on another day of the week.¹⁸⁵ Other kinds of accommodations upheld in the face of Establishment Clause challenges have included the provision of bus transportation¹⁸⁶ and secular textbooks¹⁸⁷ to religiously affiliated schools, "released time" programs for students to leave school and attend religious instruction during the schoolday,¹⁸⁸ inclusion of religious with secular symbols in holiday displays,¹⁸⁹ and the hiring of chaplains by legislatures to open their sessions with prayer.¹⁹⁰

The question naturally arises whether statutory exemptions from child abuse and neglect laws for religiously motivated medical decisionmaking are simply another permissible accommodation to reli-

180. *Selective Draft Law Cases*, 245 U.S. 366 (1918) (dismissing the challenge without stating a reason); *see also Gillette v. United States*, 401 U.S. 437, 450-54 (1971) (refusing to extend exemption to one who objected to service only in unjust wars, but affirming the exemption); *Welsh v. United States*, 398 U.S. 333, 340 (1970) (extending exemption to one with nontheistic conscientious scruples); *United States v. Seeger*, 380 U.S. 163, 187-88 (1965) (extending exemption to one who disavowed belief in a Supreme Being). For cases clarifying that these exemptions are not required by the Free Exercise Clause, *see Gillette*, 401 U.S. at 461 n.23 (citing *Hamilton v. Board of Regents*, 293 U.S. 245, 264 (1934)); *United States v. Macintosh*, 283 U.S. 605, 623-24 (1931).

181. *Walz*, 397 U.S. at 680.

182. *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987).

183. *Employment Div. v. Smith*, 494 U.S. 872, 890 (1989) (finding it "not surprising that a number of States have made an exception to their drug laws for sacramental peyote use").

184. *United States v. Lee*, 455 U.S. 252, 255 n.4, 260-61 (1982).

185. *Braunfeld v. Brown*, 366 U.S. 599, 608 (1961) (plurality opinion).

186. *Everson v. Board of Educ.*, 330 U.S. 1, 17 (1947).

187. *Board of Educ. v. Allen*, 392 U.S. 236, 238 (1968).

188. *Zorach v. Clauson*, 343 U.S. 306, 312 (1952).

189. *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989) (upholding display on county property of a menorah and Christmas tree together with a secular "Salute to Liberty" message while striking down display of an isolated nativity scene); *Lynch v. Donnelly*, 465 U.S. 668, 685 (1984) (upholding municipal display of nativity scene with secular symbols such as Santa Claus, elves, carolers, and cutout figures of a clown, an elephant, and a teddy bear with a large "Seasons Greetings" banner).

190. *Marsh v. Chambers*, 463 U.S. 783, 786 (1983).

gious values in a pluralistic society, at least up to the point where the decisionmaking pits the child's welfare against her parents' religious and other rights. Clearly, that is how the administering federal agency has regarded these laws,¹⁹¹ and even the state criminal cases have left some room for the accommodation.¹⁹² Put another way, what distinguishes these statutory exemptions from other accommodations, such that they cannot survive scrutiny while others can?

The rationales of the Court's accommodation cases should prove instructive. Unfortunately, however, they present a confusing and often contradictory picture, out of which it is difficult to weave a coherent thread. One set of permissible accommodations involves situations where "the benefits derived by religious organizations flowed to a large number of nonreligious groups as well."¹⁹³ A primary example is *Walz v. Tax Commission*,¹⁹⁴ involving property tax exemptions for houses of religious worship as one type of a variety of nonprofit, quasi-public institutions such as hospitals, libraries, and scientific and historical groups. Cases upholding bus service and textbooks for students attending private schools, including religiously affiliated schools,¹⁹⁵ would also fit this paradigm. Another factor, again pertinent in *Walz*, is whether the law provides a uniform benefit to *all* religious organizations, and thus avoids favoring one or a few.¹⁹⁶ Although its importance to the case is unclear, this feature was obviously present in *Amos*.¹⁹⁷ It also characterizes "released time" educational programs (at least in principle).¹⁹⁸ Neither of these "breadth" factors applies to spiritual treatment accommodation statutes; only

191. See *supra* note 6 and accompanying text.

192. See *supra* note 9 and accompanying text (noting that state courts regard as criminal only that behavior which poses severe danger to the child's life or health).

193. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 11 (1989) (striking down, under Establishment Clause principles, a state sales tax exemption for religious publications promoting religious teachings while the sales of other kinds of publications were taxed).

194. 397 U.S. 664 (1970).

195. See *supra* notes 186-87 and accompanying text.

196. *Walz*, 397 U.S. at 664; see *Texas Monthly*, 489 U.S. at 12 (1989); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987).

197. *Amos*, 483 U.S. at 327.

198. See *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (equating the released time program with the granting of requests to leave school to attend mass, for Yom Kippur, or for a Protestant baptismal ceremony). Justice Douglas noted, "[w]e are a religious people whose institutions presuppose a Supreme Being" and concluded that "[w]hen the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions." *Id.* at 313-14. It appears unlikely that such a statement would appear in a modern opinion, given current Establishment Clause analysis. See, e.g., *supra* note 128 and cases cited therein.

religious actors are benefitted by them, and then only those of a particular religious viewpoint.

Legislative prayer has been justified by the Court on historical grounds,¹⁹⁹ and the use of religious with secular symbols in holiday displays has also been traced to historical roots in a celebration now regarded as secular in nature.²⁰⁰ As noted earlier, however, spiritual treatment exemptions are of relatively recent origin;²⁰¹ history and tradition do not play a role in exemptions to medical care otherwise required by anti-child abuse/neglect laws.

In any event, the exception of religiously motivated actors from a general governmental regulation because of a unique belief presents a different kind of accommodation from those just cited, requiring a different kind of analysis. The closest parallel in permissive accommodation cases would appear to be those upholding exemptions for conscientious objectors from combat service: each policy favors religiously motivated individuals of a particular minority religious viewpoint and excepts them from an otherwise applicable general standard of behavior. The cases, however, are hopelessly deficient as sources of general principles of acceptable accommodation. Chief Justice White's opinion in the first of these, the *Selective Draft Law Cases*,²⁰² is unsurprisingly unhelpful: "we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act . . . because we think its unsoundness is too apparent to require us to do more."²⁰³ Succeeding cases have concerned only the meaning of the phrase "religious training and belief" in the exemption or its applicability to those opposed only to service in unjust wars.²⁰⁴ The opinions characterize the ex-

199. *Marsh v. Chambers*, 463 U.S. 783, 786-87 (1983).

200. *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 680-81 (1984); see *supra* note 189 and accompanying text. In most of the cases cited in this section, the accommodation has been saved from invalidation under the Establishment Clause largely on the grounds that it serves to keep government and religion disentangled, or to prevent the intrusion of government into religious matters, thereby preserving the separation of church and state.

201. See *supra* notes 32-45 and accompanying text (legislative history).

202. 245 U.S. 366 (1918).

203. *Id.* at 389-90.

204. See *Gillette v. United States*, 401 U.S. 437, 450-54 (1971) (justifying refusal to extend exemption to those opposed only to service in unjust wars); *Welsh v. United States*, 398 U.S. 333 (1970) (extending exemption to atheist with conscientious scruples); *United States v. Seeger*, 380 U.S. 163, 176 (1965) (defining "religious training and belief" broadly to include "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption").

emptions as “neutral” in the sense that they do not discriminate among religions,²⁰⁵ pragmatic in their realization that conscientious objectors would not make effective fighting troops,²⁰⁶ and permissible as accommodations of free exercise values, “in line with ‘our happy tradition’ of ‘avoiding unnecessary clashes with the dictates of conscience.’”²⁰⁷

A generally worded statutory exemption for religiously motivated parental behavior concerning medical decisions for a child also does not discriminate among religions as such²⁰⁸ and may be aimed at the free exercise value of avoiding “unnecessary clashes with the dictates of conscience.” These descriptions alone, however, are insufficient criteria for the permissibility of a governmental accommodation to religion that lies outside the requirements of the Religious Freedom Restoration Act.²⁰⁹

B. A Proposed Test

Two of the Supreme Court’s recent discussions of the permissible scope of religious accommodation may prove helpful in arriving at a workable jurisprudence to apply to the spiritual treatment exemption problem. Although some commentators find the two cases inconsistent,²¹⁰ at least one other agrees that together they may point the way to a cohesive philosophy.²¹¹ *Corporation of the Presiding Bishop v.*

205. *Gillette*, 401 U.S. at 451-53.

206. *Id.* at 453 (citing *Welsh*, 398 U.S. at 369 (White, J., dissenting)). This provides a strong secular purpose for the policy, as required by traditional Establishment Clause doctrine. See *supra* notes 118-22 and accompanying text.

207. *Gillette*, 401 U.S. at 453 (quoting *United States v. Macintosh*, 283 U.S. 605, 634 (1931) (Hughes, C.J., dissenting)).

208. *But see* statutes cited *supra* notes 140-42 and accompanying text (singling out the Christian Science denomination or members of a “recognized church” for the exemption); note, however, that the former federal regulation used general language, as do most state statutes; see *supra* note 36 and accompanying text.

209. Their military setting detracts still further from the potential usefulness of the conscientious objector cases; the Court has consistently maintained strong deference to Congressional and military judgment in matters having to do with the national defense. See, e.g., *Goldman v. Weinberger*, 475 U.S. 503 (1986) (upholding the Air Force’s power to forbid a clinical psychologist, who was an ordained rabbi, from wearing a yarmulke while in uniform).

210. See, e.g., Lupu, *Reconstructing*, *supra* note 57, at 564 (stating that the two cases together “reveal substantial uncertainty within the Court’s current membership concerning the scope of permissible accommodations”); Tushnet, *supra* note 47, at 388 (commenting that “[t]he result in *Texas Monthly* was not easy to reconcile with *Corporation of Presiding Bishop v. Amos*”).

211. See McConnell, *Update*, *supra* note 62, at 696-98 (construing both cases as pro-accommodationist).

Amos,²¹² a unanimous decision,²¹³ upheld Title VII's exemption for religious organizations from the prohibition against discrimination in employment on the basis of religion, even with respect to the organizations' secular nonprofit activities. Justice White, for the Court, cast favor upon a "benevolent neutrality"²¹⁴ which permits a "legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."²¹⁵ Despite the fact that religion was singled out for a benefit, accommodation in Title VII was appropriate because it was lifting a regulation that itself burdened the exercise of religion; thus, similar benefits for secular entities were unnecessary.²¹⁶ Equal protection principles were not violated because all religious organizations received the same benefit, and the classification of religious organizations was related to the legitimate purpose of alleviating a government-imposed burden correctly perceived as an onus on free exercise values.²¹⁷

In *Texas Monthly, Inc. v. Bullock*,²¹⁸ the Court invalidated an exemption for religious publications from a sales tax imposed on all other publications. Although this case, like *Amos*, involved lifting from the shoulders of religious organizations a burden otherwise imposed by government, that relief was not seen by Justice Brennan in his plurality opinion as having the legitimate purpose sanctioned in *Amos*:

[W]hen government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion . . . it "provide[s] unjustifiable awards of assistance to religious organizations" and cannot but "conve[y] a message of endorsement" to slighted members of the community.²¹⁹

212. 483 U.S. 327 (1987).

213. Justice White wrote the opinion, in which Chief Justice Rehnquist and Justices Powell, Stevens, and Scalia joined. Justice Brennan, joined by Justice Marshall, concurred separately, as did Justice Blackmun and Justice O'Connor.

214. *Amos*, 483 U.S. at 334 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970)).

215. *Id.* at 335.

216. *Id.* at 338.

217. *Id.* at 339.

218. 489 U.S. 1 (1989).

219. *Id.* at 15 (quoting *Amos*, 483 U.S. at 348 (O'Connor, J., concurring in the judgment)).

Brennan's views in *Texas Monthly*, together with the analysis of *Amos*,²²⁰ suggest the following criteria for evaluating the permissibility of an accommodation directed exclusively at religious actors: (1) the accommodation should lift a state-imposed burden from the religious actor; (2) the burden should pose a significant deterrent to the free exercise of religion (although the relief need not be *mandated* by the Free Exercise Clause for the accommodation to be valid); and (3) nonbeneficiaries should not be markedly burdened by the accommodation to the religious actor.²²¹

Although the *Texas Monthly* rationale represents the consensus of only Justices Brennan, Marshall, and Stevens, it was not *per se* repudiated by Justices White, Blackmun, and O'Connor (although the latter two would probably permit broader instances of accommodation than would the *Texas Monthly* plurality).²²² In any event, these criteria present an extremely helpful framework for analyzing the "narrow channel" between the "Scylla and Charybdis"²²³ of the two

220. This discussion assumes that the pre-*Smith* demarcations of the "zone of accommodation" have not been disturbed by the Religious Freedom Restoration Act. See *supra* notes 95-100 and accompanying text. Both *Amos* and *Texas Monthly* were decided prior to *Smith*.

221. Although Justice Brennan appears to view the first and third criteria in the disjunctive, the suggestion here is that all three should be met in order for the non-mandated accommodation to be viewed as permissible. Accord McConnell, *Update, supra* note 62, at 687 ("[T]here is no legitimate claim for accommodation when the obstacles to religious exercise are not caused by the government and the failure of the government to accommodate would not constitute unequal treatment."). McConnell also agrees that a weighing of the burdens on nonbeneficiaries is crucial to an evaluation of the permissibility of accommodations, but he proposes a slightly different analysis from Justice Brennan's; *id.* at 702-05 (finding "substantial burdens" an unsatisfactory test and advocating a balancing of the burdens to nonbeneficiaries against the impact on religious practice); see also *infra* notes 228-31 and accompanying text (discussing support for each of the three criteria).

222. Justice White concurred in the judgment on the basis of the Free Press Clause. *Texas Monthly*, 489 U.S. at 25-26. Justice Blackmun, joined by Justice O'Connor, concluded that "[a] statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable." *Id.* at 28. However, they did find that Justice Brennan's opinion subordinated the Free Exercise Clause, and indicated possible approval of a statute also exempting "philosophical literature distributed by nonreligious organizations devoted to such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong." *Id.* at 27-28. Their reservations would not be applicable in the governmental accommodations under consideration here, as a similar secular exception to child abuse and neglect statutes is difficult to conceive.

223. *Id.* at 42 (Scalia, J., dissenting) ("Justice Brennan would completely block off the already narrow 'channel between the Scylla [of what the Free Exercise Clause demands] [sic] and the Charybdis [of what the Establishment Clause forbids] [sic] through which any state or federal action must pass in order to survive constitutional scrutiny.") (citing *Thomas v. Review Bd. of Ind. Empl. Sec. Div.*, 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting)).

religion clause concepts, and they also help point the way to the deficiencies in legislative accommodations for parents providing spiritual treatment alone to their severely ill children.²²⁴ Justice Brennan's criteria are better suited to a religious exemption question than is the *Lemon* test.²²⁵ Just as Justice O'Connor offered her "endorsement" concept as a "clarification" of the *Lemon* criteria in an accommodation context,²²⁶ Justice Brennan's three principles help to provide a definition for "endorsement," giving it the substance and specificity seen as lacking by its critics.²²⁷

Each factor helps to preserve the constitutionally necessary neutrality between government, on the one hand, and religious actors, on the other. The requirement that the accommodation provide relief from a burden imposed by the state, rather than one resulting from the behavior of private actors, prevents legislative overreaching in favor of religiously motivated individuals or organizations.²²⁸ The need for the burden to pose a significant deterrent to free exercise values provides a constitutionally acceptable rationale for according

224. For an accommodationist's view substantially agreeing with Brennan's criteria, see McConnell, *Update, supra* note 62, at 698-708 (noting also that he would add a fourth requirement, that the accommodation be "provided to all similarly situated religions without favoritism or discrimination") *Id.* at 698.

225. See *supra* notes 120-51 and accompanying text (discussing inadequacies of *Lemon* for analyzing an accommodation to religiously motivated behavior).

226. See *supra* note 151 and accompanying text.

227. Justice Brennan's invocation of the language of "endorsement" in his *Texas Monthly* opinion suggests this connection; see *supra* note 219 and accompanying text; see also *supra* note 176 and accompanying text (discussing criticisms of the "endorsement" test).

228. See, e.g., *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (invalidating a state statute requiring private employers to provide employees with an absolute right not to work on their Sabbath). Other Justices have agreed that a valid accommodation must consist of the lifting of a government-imposed burden; see *Lee v. Weisman*, 112 S. Ct. 2649, 2677 (1992) (Souter, J., joined by Stevens and O'Connor, JJ., concurring) ("[A]ccommodation must lift a discernible burden on the free exercise of religion."); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring in the judgment) ("Of course, in order to perceive a government action as a permissible accommodation of religion, there must in fact be an identifiable burden *on the exercise of religion* that can be said to be lifted by the government action."). At least one leading accommodationist has made a similar statement: see McConnell, *Update, supra* note 62, at 686-87 (suggesting that exemption, as one form of accommodation [the form at issue in this Article], is appropriate when government action itself has caused the obstacle to religious exercise). McConnell's definition of "accommodation" would go farther than exemption, however; see *id.* at 712 ("[C]ontrary to language in recent accommodation cases . . . the government should be able to require accommodations in the private sector, at least where it has extended comparable protections to secular concerns of a similar character.") (citing the example of the Title VII requirement that employers make "reasonable accommodations" to the religious needs of their employees.).

some privilege to behavior that, absent the religious motivation, would be subject to governmental prohibition.²²⁹ Finally, the requirement that nonbeneficiaries not be markedly burdened by the accommodation to the religious actor²³⁰ helps ensure that the relief will be narrowly tied to the legitimate purpose of alleviating free exercise burdens and also preserves equal protection principles, which would ordinarily prohibit favoring religious over nonreligious actors or religious over nonreligious motivations.²³¹

C. Spiritual Treatment Exemptions Fail the Accommodation Test

1. *The Framework Applied*

Statutory exemptions from child abuse and neglect laws for religiously motivated parents who choose to treat their children's medical conditions by spiritual treatment alone meet the first two criteria delineated by Justice Brennan, but not the third.²³² As was the case in

229. *Lee*, 112 S. Ct. at 2677 (Souter, J., joined by Stevens and O'Connor, JJ., concurring); *Amos*, 483 U.S. at 335 (see *supra* note 122 and accompanying text for discussion); *Id.* at 348 (1987) (O'Connor, J., concurring) (all discussing the appropriateness of an exemption when the burden on free exercise values posed by government is significant).

230. Accommodationists seem to agree that a valid accommodation must meet this criterion. See McConnell, *Update*, *supra* note 62, at 692 n.28 ("Of course, the [religious exercise] right is limited by the rights of others . . ."); *id.* at 693 ("[S]ome laws are so necessary to the common good that exceptions would be intolerable."); *id.* at 702-05 (discussing with favor Brennan's third criterion and suggesting that its application involve a weighing of the burden on religious practice if the accommodation is not accorded against the burden on other interests if the accommodation is permitted); McConnell, *Accommodation*, *supra* note 62, at 31 ("Where the government determines that it can make an exception without unacceptable damage to its policies, there is no reason for a court to second-guess that conclusion *unless the constitutional rights of other persons are adversely affected.*") (emphasis added); *id.* at 37-38 ("[R]eligious accommodations often, perhaps always, impose some costs on others The question, however . . . is whether recognition of the believer's right to accommodation 'serve[s] [sic] to abridge any other person's religious liberties.'") (quoting *Sherbert v. Verner*, 374 U.S. 398, 398 (1963)). Judging from some of his general language, Douglas Laycock apparently agrees, see Laycock, *Remnants*, *supra* note 61, at 30 ("A right to religious exemptions from regulation cannot be absolute; the state must be able to override it for sufficiently compelling reasons."); *id.* at 33 ("The question should not be whether it would be better on the whole to deny the exemption, but whether a particular religious exercise is doing such severe and tangible harm that the Court can imply from necessity" that an accommodation should not be accorded). For an argument that the exemptions at issue are invalid precisely because they trample upon the constitutionally protected rights of the affected children, including their religious liberties, see *infra* notes 237-66 and accompanying text.

231. See *supra* note 146 and cases cited therein (discussing Establishment Clause requirement that government not favor religion over nonreligion).

232. Although Justice Brennan stated his first and third criteria in the disjunctive, a failure of either would be sufficient, in his view, to defeat the accommodation. See *supra* note 219 and accompanying text.

both *Amos* and *Texas Monthly*, the exemptions relieve religious actors from a government-imposed burden, for the statutes themselves define the forbidden conduct and impose on parents the duty of adequate medical care for their minor children.²³³ As in *Amos*, but unlike the situation in *Texas Monthly*, the burden works a "significant state-imposed deterrent to the free exercise of religion."²³⁴ Reliance upon spiritual healing, and the concomitant shunning of conventional medical care, lie at the heart of the religious practices of those currently protected by the exemptions.²³⁵ The difference from *Amos*, however, and the factor that makes these accommodations, like that in *Texas Monthly*, impermissible, is that their operation *does* "burden nonbeneficiaries markedly."²³⁶ Furthermore, the nonbeneficiaries who are so heavily burdened are drawn from perhaps the most vulnerable group in our entire population, children, whose welfare the abuse and neglect statutes seek to protect.

2. *The Statutes Violate Children's Free Exercise Rights*

Justice Douglas's partial dissent in *Wisconsin v. Yoder*²³⁷ succinctly points out the fallacy of focusing on parental rights alone in an evaluation of a religious accommodation affecting decisionmaking for children: "If the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notions of religious duty upon their children."²³⁸ He buttressed his position by noting that "[r]eligion is an individual experience,"²³⁹ that "the children them-

233. See *supra* note 38 and accompanying text (discussing federal regulation requiring "adequate medical care"); *supra* notes 1-2 and accompanying text (citations to child abuse/neglect statutes).

234. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 15 (1989); see *supra* notes 219-21 and accompanying text (discussing the passage).

235. See, e.g., J. Thomas Black, *Christian Science Convictions*, reprinted in FREEDOM AND RESPONSIBILITY: CHRISTIAN SCIENCE HEALING FOR CHILDREN 27 (1989); Allison W. Phinney, Jr., *What Is Christian Science Treatment?*, reprinted in FREEDOM AND RESPONSIBILITY, *supra* at 21; Nathan A. Talbot, *The Position of the Christian Science Church*, reprinted in FREEDOM AND RESPONSIBILITY *supra* at 18; see also MARY B. EDDY, *Science, Theology, Medicine*, in SCIENCE AND HEALTH WITH KEY TO THE SCRIPTURES 107-64 (1991); see generally THE CHRISTIAN SCIENCE PUBLISHING SOCIETY, CHRISTIAN SCIENCE: A SOURCEBOOK OF CONTEMPORARY MATERIALS (1990); see also Clark, *supra* note 111, at 568-69 (noting that Christian Scientists believe that disease can be controlled through spiritual healing); Monopoli, *supra* note 3, at 339 n.118 (noting that spiritual healing is a basic tenet of Christian Science).

236. *Texas Monthly*, 489 U.S. at 15; see *supra* notes 219-21 and accompanying text (discussing the passage).

237. 406 U.S. 205 (1972).

238. *Id.* at 242 (Douglas, J., dissenting in part).

239. *Id.* at 243.

selves have constitutionally protectible interests,"²⁴⁰ and that "[i]t is the future of the [minor] student, not the future of the parents, that is imperiled by today's decision."²⁴¹ Justice Douglas was unsatisfied with the majority's answer that the criminal statute applied only to the children's parents, and that it was the parents, not their children, who would be subjected to penalties for violations.²⁴² In his view, the children's rights at issue were too important, and the potential effects of cutting off their education after the eighth grade too deleterious to their well-being,²⁴³ to justify the majority's narrow focus upon the parents' interests. To the argument of the court below that "[w]hen a child reaches the age of judgment, he can choose for himself his religion,"²⁴⁴ Justice Douglas responded that the high school age children whose welfare was at stake in the case were already sufficiently mature to have the right at least to be heard before the Court rendered a binding decision in their parents' favor.²⁴⁵

Even assuming that the majority drew the appropriate accommodation line in the *Yoder* case itself, Justice Douglas's cogent arguments apply with much greater force to an exemption permitting parents to choose spiritual treatment over conventional medical care for their severely ill minor children. Those children, too, have constitutional rights to the protection of their lives and to their own free exercise values. Child neglect laws are an important protection of children's lives and welfare. Although parents have the right to inculcate their own religious views in their children,²⁴⁶ the children have no concomitant duty to adopt those views or to follow their parents' religious practices. The effect of the spiritual treatment exemptions, however, is to enable parents to force harmful religious practices upon their children.²⁴⁷ Furthermore, unlike the circumstances in *Yoder*, the children subjected to spiritual treatment alone frequently are not sufficiently mature even to entertain their own religious or medical views, let alone to express their opinions or to make choices on their own behalf.²⁴⁸ If the consequences of their parents' choices are permanent

240. *Id.*

241. *Id.* at 245.

242. *See id.* at 230-31.

243. *Id.* at 240 (White, Brennan and Stewart, JJ., concurring).

244. *Id.* at 245 n.3 (quoting *State v. Yoder*, 182 N.W.2d 539, 543 (Wis. 1971)).

245. *Id.*

246. *See supra* notes 26-29 and accompanying text.

247. *See supra* notes 236-66 and accompanying text (discussing the proposition that such imposition is prohibited under the Establishment Clause).

248. *See SWAN, supra* note 6, at 1-15 (listing forty-two prosecutions and their results; many of the children involved were infants; few were over the age of 10).

debilitation or death, the children will never have the opportunity to make their own compensatory choices in later life in order to correct the deficiency. The Court's opinion in *Yoder* distinguished the situation there from *Prince v. Massachusetts*²⁴⁹ and similar instances refusing accommodation, characterizing the case as "not one in which any harm to the physical or mental health of the child or to the public safety, peace, order or welfare has been demonstrated or may be properly inferred."²⁵⁰ The clear implication of Chief Justice Burger's statement was that if such harm were at stake, the outcome would be different. Obviously, it is precisely "harm to the physical or mental health of the child" that forms the central concern of child abuse and neglect statutes. It is directly endangered by exemptions from those statutes for religiously motivated parental conduct.

3. *The Exemptions Violate Children's Rights to Equal Protection of the Laws*

Spiritual treatment exemptions also violate the Equal Protection Clause of the Fourteenth Amendment.²⁵¹ As previously noted, these laws ensure that some group of children will be denied the "adequate medical care" deemed necessary by the legislature to protect their health and welfare.²⁵² The question becomes whether the legislature may permissibly deny to that group of children the protections that it demands for all others. Put another way, can legislatures vary the definition of child abuse/neglect between one set of children and another based upon the religious beliefs of their parents?

Under classic equal protection analysis, children have never been defined as a "discrete and insular minority,"²⁵³ such that courts should subject legislative distinctions concerning their welfare to a heightened level of review.²⁵⁴ Indeed, that notion has been specifically re-

249. 321 U.S. 158 (1944); *see supra* notes 82-86 and accompanying text.

250. *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972). Also citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (*see supra* note 93 and accompanying text).

251. *See supra* note 21.

252. *Accord Monopoli*, *supra* note 3, at 347 (quoting *State v. Miskimens*, 490 N.E.2d 931, 935 (Ohio Ct. Com. Pl. 1984) ("[I]f the real purpose of [the neglect statute] is to protect children from parental defalcation, then the prayer exception creates a group of children who will never be so protected, through no fault or choice of their own.") Therefore the exemption violates equal protection guarantees. *See also supra* notes 6, 8, 110-11 and accompanying text.

253. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

254. Justice Stone's famous footnote, *supra* note 253, has become the touchstone for identifying classifications of people eligible for heightened scrutiny under equal protection analysis, *see* TRIBE, *supra* note 22, § 16-13, at 1465 and n.2 and authorities cited therein.

jected.²⁵⁵ Nonetheless, cases specifically affecting children show a marked consistency in the special regard courts pay to both the vulnerability of children and their powerlessness to control their own situations.²⁵⁶ *Plyler v. Doe*²⁵⁷ is especially instructive. Faced with the question of whether the Equal Protection Clause required Texas to finance the education of children who were undocumented aliens, the Supreme Court rejected arguments both that the classification drawn by the legislature was "suspect" and that education was a "fundamental right."²⁵⁸ On the other hand, the Court was acutely aware that "the children who are plaintiffs in these cases 'can affect neither their parents' conduct nor their own status.'"²⁵⁹ This fact, together with the importance of education and "the lasting impact of its deprivation on the life of the child,"²⁶⁰ led the Court to the conclusion that Texas could not rationally limit the protections of its laws as between one group of children and another, based upon their parents' behavior, in the manner that its legislature had chosen.²⁶¹

Adequate medical care is also not a fundamental right; it is not even, like education, a government-provided benefit or service. Child abuse and neglect statutes do, however, seek to ensure that all children will receive adequate medical care by imposing on their parents or guardians a duty to provide it; indeed, federal regulations require states to enact such legislation in order to retain eligibility for federal assistance to their child welfare programs.²⁶² As with education, the "lasting impact of its deprivation on the life of the child"²⁶³ makes adequate medical care a subject of special concern, and the powerlessness of the affected children to act on their own behalf should enhance our sense of urgency to deal with this problem. As already

255. *Plyler v. Doe*, 457 U.S. 202 (1982); see *infra* note 258 and accompanying text.

256. In addition to the cases cited in this discussion, the Court's cases concerning classifications of children based on illegitimacy are an example of this sensitivity. Such classifications are now subject to intermediate scrutiny. *Clark v. Jeter*, 486 U.S. 456, 461 (1988); see also *Pickett v. Brown*, 462 U.S. 1 (1983); *Trimble v. Gordon*, 430 U.S. 762 (1977); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Levy v. Louisiana*, 391 U.S. 68 (1968).

257. 457 U.S. 202 (1982).

258. *Id.* at 223.

259. *Id.* at 220 (quoting *Trimble*, 430 U.S. at 770).

260. *Id.* at 221. In its lengthy discussion of the importance of education, the Court cited, *inter alia*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); and *Meyer v. Nebraska*, 262 U.S. 390 (1923); see also *Plyler*, 457 U.S. at 221-23.

261. *Plyler*, 457 U.S. at 230.

262. See *supra* note 38 and accompanying text.

263. See *supra* note 260 and accompanying text (quoting *Plyler*, 457 U.S. at 221).

discussed,²⁶⁴ it is no answer that the exemptions attempt to serve the children's parents' free exercise rights; it is the free exercise rights of the *children* and *their* rights to equal protection under the laws that are implicated here.

The common law doctrine of *parens patriae*, according to which the sovereign has special obligations to minor children within its jurisdiction,²⁶⁵ buttresses the concept that the legislature must impose the same duties on all parents or guardians when it seeks to ensure the welfare of their children. When a court must make a specific decision affecting a particular child—such as a custody decision or an order for specified medical care—the standard guiding principal is the best interests of the *child*; parents' rights are subsidiary.²⁶⁶ Given our society's concern for the welfare of children, and the statutory presumption that failure to provide them with certain necessities constitutes abuse or neglect, it is incomprehensible that the law would permit different definitions of abuse or neglect to pertain to different children, depending upon their various parents' religious beliefs and practices. Such an approach is a blatant violation of children's rights to equal protection of the laws.

Conclusion: Parental Rights as the Appropriate Source for Medical Decisionmaking for Minor Children

Spiritual treatment exemptions from child abuse and neglect statutes violate both the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. This is not to derogate the fact that parents have constitutionally protected rights to bring up and educate their children as they see fit and that these rights generally include the right to make decisions about their minor children's medical care. Parental decisionmaking rights are grounded in the notion that the family is much better situated than government to discern the best interests of minor children and in the presumption that parents will generally act accordingly. In *Parham v. J.R.*,²⁶⁷ holding that parents could commit their child to a state mental institution pursuant to voluntary commitment procedures, the Supreme Court stated:

264. See *supra* notes 242-48 and accompanying text.

265. See *supra* note 23 and accompanying text.

266. CLARK, *supra* note 29, § 9.3, at 335-338 (medical treatment); *id.* at 788 (“[W]hen the child's welfare seems to conflict with the claims of one or both parents, the child's welfare must prevail.”); *id.* at 824-27 (custody).

267. 442 U.S. 584 (1979).

Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is “the mere creature of the State” and, on the contrary, asserted that parents generally “have the right, coupled with the high duty, to recognize and prepare [their children] [sic] for additional obligations.” Surely, this includes a “high duty” to recognize symptoms of illness and to seek and follow medical advice. The law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.²⁶⁸

The Court went on to note that incidents of child abuse and neglect ran counter to the usual presumption and justified government intervention; otherwise, parents should normally have decisionmaking authority even in cases where constitutional rights of children are identifiable, so long as there are adequate safeguards for the latter.²⁶⁹ In this regard, the Court specifically “recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.”²⁷⁰

The analysis of *Parham v. J.R.* provides the appropriate framework for the evaluation of parental medical decisionmaking rights on behalf of minor children, *whether or not* the parents are religiously motivated in their actions. Generally, parents of minor children have a duty to provide them with “adequate medical care.” If the children are too young to make their own choices, their parents have both the freedom and the responsibility to make health care decisions for them. Of course, the parents’ perspectives and values, including their religious beliefs, will play a part in the choices they make. The state, however, has defined the parameters of parental freedom: failure to provide adequate medical care amounts to child abuse or neglect and entitles the state to step in and take over the supervision of a child’s medical treatment or to punish parents whose violation of their statutory duty has resulted in harm to a child. At this point, the nature of the parents’ motivations (whether religious or not) is irrelevant; the

268. *Id.* at 602 (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925)) (other citations omitted).

269. *Id.* at 602-03.

270. *Id.* at 603 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

important considerations are the rights and welfare of the affected children.

Any other approach, although appearing out of respect for parents' religious freedom,²⁷¹ lends government support to the particular religious choices of certain adults at the expense of the religious and equal protection rights of their children. Such governmental behavior amounts to an endorsement of the adults' religious practices, which violates the Establishment Clause of the Constitution. The invalidation or repeal of spiritual treatment exemptions from child abuse and neglect statutes would leave in place neutral laws allowing full constitutional play to parental decisionmaking rights while fulfilling the state's obligation to protect the health and welfare of children and according to them their own religious freedom and rights to equal protection of the laws. This course of action is the only way to serve the entire complex of constitutional values at stake in this knotty problem.

271. There in fact is a question with respect to how intrusive upon parental religious rights the neutral laws advocated here would actually be. Although it is true that spiritual healing is a basic tenet of, for example, the Christian Science Church (undoubtedly the largest group affected), *see supra* note 235 and accompanying text, it is worthy of special note that "[i]n Great Britain and Canada, where medical care is mandatory for all children, the church allows its practitioners to pray for children who are also receiving medical care." Andrew Skolnick, *Religious Exemptions to Child Neglect Laws Still Being Passed Despite Convictions of Parents*, 264 JAMA 1226 (1990).

