SPIRITUAL HEALING AND THE FREE EXERCISE CLAUSE: AN ARGUMENT FOR THE USE OF STRICT SCRUTINY

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If the purpose or effect of a law is to impede the observance of one or all religions . . . that law is constitutionally invalid even though the burden may be characterized as being only indirect.[1]

-Chief Justice Warren, 1961

It is a permissible reading of the text [of the Constitution] . . . to say that if prohibiting the exercise of religion . . . is not the object of [the law] but merely an incidental effect . . . the First Amendment has not been offended.[2]

-Justice Scalia, 1990

To make accommodation between these freedoms and an exercise of state authority always is delicate.[3]

-Justice Rutledge, 1943

I. INTRODUCTION

The U.S. Constitution, and in particular the Bill of Rights, was designed to protect individual liberties. In recent years, however, Supreme Court decisions regarding the free exercise of religion have turned the Constitution against itself. Instead of strengthening free exercise protections, the Court has weakened and narrowed them; what were once well-established tests applied in free exercise cases are being distinguished out of existence. This weakening of free exercise

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[1] Braunfeld v. Brown, 366 U.S. 599, 607 (1961).

[2] Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 878 (1990).

[3] Prince v. Massachusetts, 321 U.S. 158, 165 (1944).

protections has had a considerable impact in the area of spiritual healing, which some religious minorities choose to use rather than conventional medicine. Specifically, a parent's freedom to treat his or her minor children according to the tenets of the parent's religion, and without conventional medical aid, is under vehement attack. Regardless of one's personal views, the issue grows more complex because the parent's rights are not the only rights involved; any analysis must also take into account the child's fundamental rights and the state's obvious interest in protecting the welfare of the child.

The purpose of this Article is two-fold: (1) to propose that in cases involving the Free Exercise of Religion, the Supreme Court has erred in recent years by moving away from strict scrutiny analysis; and (2) in suggesting a return to the principle of strict scrutiny, to propose possible ways to fully account for the multiple interests involved in religious spiritual healing cases.

II. THE DILEMMA OF SPIRITUAL HEALING

The practice of spiritual healing, often ascribed to Christian Scientists, has never before been more controversial or faced a larger barrage of criticism.[4] This criticism, though often heated, becomes particularly so when the health and welfare of a child are at stake. Advocates on both sides of the issue agree that the safety of children is paramount. However, while the protection of the child is to be considered first and foremost, ignoring the additional rights at issue, that of the parents and the states, oversimplifies the matter. Indeed, the rights involved, including the free exercise of religion and parenting, are fundamental and cannot be disregarded.

How then is a state, faced with protecting both the welfare of its minor citizens and the fundamental rights of the relevant adult population, to balance these issues? Many positions have been advanced, ranging from an absolute ban on state intrusion to complete state control of the matter. However, neither extreme satisfies all of the rights involved. The solution, then, lies somewhere in between these extremes, in a balance that may be attained through strict scrutiny. To understand this balance, however, one must understand the individual issues that form the basis of the current debate.

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[4] Christian Science is one of the largest religions to practice spiritual healing and, consequently, has come under particular attack in recent years. *See, e.g.*, Brian MacQuarrie, *Jurors Seen Rejecting Faith as Defense*, BOSTON GLOBE, June 15, 2002, at B4; Lionel Van Deerlin, *When Leaving Health Care to Faith Can Mean Death*, SAN DIEGO UNION-TRIBUNE, May 23, 2001, at B9. This Article is in response to those attacks and is written particularly with Christian Science in mind.

A. Arguments Against State Control of Spiritual Healing

1. The Free Exercise Clause

An argument often raised for the freedom of religious actions is that the U.S. Constitution's Framers intended to allow for unhindered freedom in the practice of one's religion.[5] Since 1878, however, this argument has repeatedly failed before the Supreme Court.[6] Moreover, language from one of the strongest advocates of the First Amendment, Thomas Jefferson, indicates this was never the intent of the Free Exercise Clause.[7] Therefore, this argument, though still raised, is unlikely to ever be successful.

2. Implicitly Ruling on the Correctness of a Religion

The Supreme Court has stated that courts should not pass judgment on the correctness of a religion.[8] Despite this, however, many courts have ruled that, under child negligence and manslaughter statutes, a parent may be criminally liable for the death of his or her minor child if the parent uses only spiritual healing to care for the minor and fails to provide conventional medical care.[9] In so holding, courts have implicitly ruled on the correctness of the religion. This can be seen when, as often occurs, a child is treated in a hospital and still dies. In such an instance, the doctor is not prosecuted for manslaughter, though a parent, in similar circumstances, would likely face prosecution.[10] By way of

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[5] While the Free Exercise Clause defense is "[t]he most common and certainly the most obvious constitutional defense that parents raise, [it] is also the least successful." Jennifer L. Hartsell, *Mother May I . . . Live? Parental Refusal of Life-Sustaining Medical Treatment for Children Based on Religious Objections*, 66 TENN. L. REV. 499, 512-13 (1999) (quoting Elizabeth A. Lingle, *Treating Children by Faith: Colliding Constitutional Issues*, 17 J. LEGAL MED. 301, 309 (1996)).

[6] In 1878, the Supreme Court held that religious convictions did not exempt believers from a criminal anti-polygamy state statute. *See* Reynolds v. United States, 98 U.S. 145 (1878).

[7] *See id.* at 164.

[8] *See* United States v. Ballard, 322 U.S. 78, 85-88 (1944). *See also* Deborah Sussman Steckler, *A Trend Toward the 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, 510-11 (1991).

[9] *See, e.g.*, Walker v. Superior Court, 763 P.2d 852 (Cal. 1988) (finding a Christian Scientist liable for daughter's death from meningitis); Commonwealth v. Barnhart, 497 A.2d 616 (Pa. Super. Ct. 1985) (finding a member of Faith Tabernacle Church liable for son's death from a tumor); New York v. Pierson, 68 N.E. 243 (N.Y. 1903) (finding a member of Christian Catholic Church of Chicago liable for infant daughter's death from pneumonia).

[10] *See* Janna C. Merrick, *Christian Science Healing of Minor Children: Spiritual Exemption Statutes, First Amendment Rights, and Fair Notice*, 10 ISSUES L. & MED. 321,

illustration, assume two children have meningitis. One child is treated with spiritual healing and the other with conventional medicine. Both children die. In many states, the parent who relied solely on spiritual healing will be subject to criminal prosecution for manslaughter.[11] The doctor, however, whose patient also died, will not. When a legal system charges only the parent with a crime, but not the doctor, despite identical results, the state is implicitly asserting that one method is correct, and one is not.[12] It is this very conduct the Supreme Court has disallowed.

3. The Fundamental Right of Parenthood

The Supreme Court has stated that a parent's right to raise his or her children according to the parent's religion is fundamental.[13] It is well understood, however, that fundamental rights are not absolute and must yield in certain circumstances. One such circumstance occurs when two fundamental rights are incompatible. In such situations, the question necessarily becomes which right is "more" fundamental. This is often a difficult determination since both rights, being fundamental, are given great weight in our society. It might be expected, therefore, that depending on the matter involved, various states would come down on opposite sides of the issue.

In the case of spiritual healing, however, it is generally held that a child's right to life trumps a parent's right to the free exercise of his or her religion. That said, one must be cautious not to conclude that the lower valued right is less *worthy* of protection simply because we find another right more valuable. To do so would be to strip the right of its fundamental status.

4. Due Process

A problem of particular import, the question of due process has come to the forefront of the debate on spiritual healing. A number of states have begun charging a parent with manslaughter when his or her child dies subsequent to the use of spiritual healing. States bring these charges notwithstanding the fact that

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328 (1994) ("[I]n fact no physician has ever been criminally convicted in the United States for negligently causing the death of a patient.").

[11] *See generally id.*

[12] *See* Newmark v. Williams, 588 A.2d 1108 (Del. 1991) (refusing to find a Christian Scientist negligent for denying her child medical care; the court relied heavily on the fact that conventional medicine would only offer a forty percent chance of survival).

[13] *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (citing Meyer v. Nebraska, 262 U.S. 390 (1923)) ("It is cardinal with us that the custody, care and nurture of the child reside first with the parent whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. And it is recognition of this that [the Court has] respected the private realm of family life which the state cannot enter.") *See also* Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872; Hartsell, *supra* note 5, at 515.

they have told parents, through separate statutes, that the use of spiritual healing is allowed even in circumstances where medical complications are readily foreseeable.[14] In such circumstances, the state legislature has usually enacted at least two statutes.[15] Typically, one statute provides an exemption from prosecution for child neglect where a parent relies on spiritual healing instead of conventional medicine.[16]

One such statute reads:

> If a parent of a minor child willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter or medical attendance, or other remedial care for his or her child, he or she is guilty of a misdemeanor punishable by a fine not exceeding two thousand dollars ($2,000), or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment . . . .
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> If a parent provides a minor with treatment by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination, by a duly accredited practitioner thereof, such treatment shall constitute "other remedial care," as used in this section.[17]

Another such statute reads:

> It is a defense [to nonsupport of a child] that the accused person, in the legitimate practice of his religious belief, provided treatment by spiritual means through prayer, in lieu of medical care, to his dependent child.[18]

Although some states have explicitly told parents that they will not be prosecuted for following their religious beliefs in caring for their children, these same states have nonetheless prosecuted parents using manslaughter statutes.[19] The common argument courts make in support of this practice is straightforward: child neglect and manslaughter statutes govern different situations.[20] Finding that

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[14] *See Walker*, 763 P.2d at 856-58.

[15] *See id.*; *see also* People v. Rippberger, 2283 Cal. Rptr. 111, 122 (Cal. Ct. App. 1991).

[16] *See Walker*, 763 P.2d at 856-58.

[17] CAL. PENAL CODE § 270 (1999).

[18] IND. CODE ANN. § 35-46-1-5(c) (Michie 1999).

[19] *See, e.g.*, *Walker*, 763 P.2d at 852; Commonwealth v. Twitchell, 617 N.E.2d 609, 614-15 (Mass. 1993).

[20] *See Walker*, 763 P.2d at 860-62 ("While certainly reflecting concern for the general welfare of children, the fiscal objectives of this support provision are so manifestly distinguishable from the specific purposes of the involuntary manslaughter and felony child-endangerment statutes—designed to protect citizens from immediate and grievous bodily harm—that section 270 cannot be read to create express exemptions from prosecution under those separate provisions as a matter of parallel construction. The Legislature has determined that the provision of prayer is sufficient to avert misdemeanor liability for neglecting one's financial responsibility to furnish routine child support. This

state legislatures never intended child neglect statutes to immunize a parent from manslaughter, the courts dismiss any exemption afforded under the neglect statutes as inapplicable.[21]

Some states, however, disagree with this practice.[22] In these states, the courts have held that the inconsistency and ambiguity that arises when spiritual treatment exemptions and child abuse or manslaughter statutes are read together precludes prosecution for want of procedural due process.[23] Because a basic requirement of due process is notice,[24] when individuals do not have sufficient notice that their actions may subject them to criminal liability, due process is offended.[25] Accordingly, when one statute gives express permission to act according to one's religion, even in situations where foreseeable medical complications may arise, subsequent prosecution of the individual for that very conduct violates due process for a lack of notice.[26]

But how does this address the argument that a child negligence statute and a manslaughter statute are intended for two completely different circumstances? Some argue that child negligence statutes are specifically intended to protect the welfare of a child while manslaughter statutes are intended to criminally punish *anyone* who "with criminal negligence . . . causes the death of another person."[27] In probably the clearest exposition of this argument, the Supreme Judicial Court of Massachusetts stated:

> The spiritual treatment provision protects against criminal charges of neglect and of wilful [sic] failure to provide proper medical care [but] says nothing about protection against criminal charges based on wanton or reckless conduct. The fact that at some point in a given case a parent's conduct may lose the protection of the spiritual treatment provision and may become

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hardly compels the conclusion that in so doing the Legislature intended to create an unqualified defense to felony manslaughter and child endangerment charges for those parents who continue to furnish prayer alone in the rare instance when a gravely ill child lies dying for want of medical attention."). It should be noted, however, that notwithstanding the Court's assertion, this statute is not exclusively about the "fiscal responsibility to furnish child support." *See* CAL. PENAL CODE § 270. *See also Rippberger*, 283 Cal. Rptr. at 122.

[21] *See Walker*, 763 P.2d at 860. *See also Twitchell*, 617 N.E.2d at 614-15.

[22] *See* Hermanson v. State, 604 So.2d 775 (Fla. 1992); State v. McKown, 475 N.W.2d 63 (Minn. 1991); State v. Miskimens, 490 N.E.2d 931 (Ohio Ct. Com. Pl., Coshocton County 1984).

[23] *See Hermanson*, 604 So.2d at 775; *McKown*, 475 N.W.2d at 63; *Miskimens*, 490 N.E.2d at 931.

[24] *SEE* JOHN E. NOWAK & RONALD D. ROTUNDA, TREATISE ON CONSTITUTIONAL LAW, SUBSTANCE AND PROCEDURE, § 17.8 (3d ed. 1999).

[25] *See id.*

[26] *See McKown*, 475 N.W.2d at 68-69.

[27] N.Y. PENAL LAW § 125.10 (McKinney 1998).

subject to the application of the common law of homicide is not a circumstance that presents a due process of law "fair warning" violation.[28]

As noted above, however, not all courts agree with this reasoning. For those courts, the argument is not whether the statutes are intended to address different issues on a level distinguished in legal theory, but whether a conflict exists because the state allows conduct through one statute that it punishes in another. While ignorance of the law is no excuse for its violation, a lack of notice is. When a state makes clear to a layperson that his or her religious conduct is acceptable, even in situations where medical complications can arise, it seems, at minimum, ambiguous for the state to then allow prosecution for the very same conduct. This Article does not argue that the purposes for which the differing statutes were created are indistinguishable. Rather, this Article suggests that because lawyers and judges cannot agree on this issue, as is made clear by the different holdings of state courts, it is unreasonable for the law to expect a layperson to traverse these ambiguities.

Notably, as has been done by two states, these ambiguities can be easily reconciled.[29] In Colorado and Oklahoma, the state legislatures have amended their child neglect statutes to clearly inform parents that, while spiritual healing is acceptable, appropriate criminal charges may be brought against a parent should he or she fail to seek medical care when a child is at risk of either a "serious disability" or "permanent physical damage."[30] In amending these statutes, the respective state legislatures have made it clear that "parents cannot now claim that they believed their actions were protected by law if their child dies as a result of spiritual treatment."[31]

It is, therefore, suggested that every state with a spiritual healing exemption follow the example set by these two states. By making the risk of prosecution for failure to seek medical care in particular circumstances explicit within the spiritual healing exemption, the state can protect the rights of parents and reduce the risk of having convictions overturned. In addressing these two areas, the state will better serve both its own rights as parens patriae and the rights of its citizens.[32]

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[28] *Twitchell*, 617 N.E.2d at 617.

[29] *See* Hartsell, *supra* note 5, at 522.

[30] *See* COLO. REV. STAT. ANN. § 19-3-103(1) (West 2002); OKLA. STAT. ANN. tit. 21, § 852(C) (West 2003).

[31] Lingle, *supra* note 5, at 317.

[32] In order that the competing interests may be balanced in the least restrictive means possible while still meeting the due process requirement of notice, the following model statute is proposed for states to follow:

> If a parent of a minor child willfully omits, without lawful excuse, necessary clothing, food, shelter, or medical attendance, or other remedial care for his or her child, he or she is guilty of a misdemeanor punishable by a fine not exceeding two thousand dollars ($2,000), or by imprisonment in the county jail not exceeding one

B. Arguments for State Control of Spiritual Healing

1. Child's Fundamental Right to Life

It is beyond argument that the right to life is fundamental.[33] In fact, while not explicit in the US Constitution, the right to life is likely the most fundamental of all rights.[34] That a person is a minor has never been held to bar this right. Therefore, when a parent acts in a manner that exposes his or her child to an injurious or life-threatening situation, one may argue that the child's fundamental right to life trumps any and all other rights, including a parent's fundamental right to free exercise of religion and parenthood.[35]

2. State's Interest in a Child's Welfare

If every person has a fundamental right to life, it follows that each state has an interest in protecting that right. While this interest applies to adults, the Supreme Court has stated it extends more so to minors:

> The state's authority over children's activities is broader than over like actions of adults . . . . A democratic society rests, for its continuance, upon

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year, or by both such fine and imprisonment.

Remedial care may include, but is not limited to, treatment by spiritual means through prayer alone in accordance with the tenets and practices of church or religious denomination, by a duly accredited practitioner thereof.

Remedial care is not intended to be limited to spiritual or religious healing. Therefore, a parent or guardian providing other remedial care, non-religious in nature, will also be precluded from prosecution so long as the remedial methods used are in accordance with an established methodology of treatment.

Notwithstanding any statements in the above paragraphs, if at any time a likelihood exists that a minor child is in imminent danger of death or substantial bodily injury, a parent or guardian is obligated to seek conventional medical care. Failure to seek such care may result in a felony prosecution under the appropriate penal statute.

[33] It is beyond the scope of this Article to address the right to life issues presently debated in the abortion and capital punishment contexts. It is arguable that the deprivation of life in a capital punishment context has passed the "due process" requirement and is not, therefore, unconstitutional notwithstanding the fundamental nature of the right. *See* U.S. CONST. amend. V. The argument that life is the highest of all rights seems apparent as all the other rights within the Constitution would be superfluous without it. *See, e.g.*, THE DECLARATION OF INDEPENDENCE para. 2 (1776).

[34] *See* U.S. CONST. amend. V (protecting citizens from the deprivation of life).

[35] *See* James G. Dwyer, *Spiritual Treatment Exemptions to Child Medical Neglect Laws: What We Outsiders Should Think*, 76 NOTRE DAME L. REV. 147, 164 (2000).

> the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. [The state] may secure this against impeding restraints and dangers within a broad range of selection.[36]

Moreover, the Supreme Court held that a state may infringe upon fundamental rights, specifically that of religion, to ensure protection of the right to life.[37] The question that arises, however, is to what extent the state may infringe upon these rights. While the states' powers are indeed broad, as the Supreme Court has noted, they are certainly not limitless.[38]

3. Equal Protection of Children

Another argument against affording parents the right to use spiritual healing to the exclusion of conventional medicine is that to do so would infringe on a child's right to equal protection of the laws.[39] In effect, if a parent who uses spiritual healing according to her religious beliefs is not legally required to seek conventional medical care for her children, and a parent who does not use spiritual healing is required to seek such care, the children are not afforded the same legal or medical protection.[40] Said differently, that a law is applied or not applied, dependent solely upon which family a child comes from, offends the equal protection of the laws.

4. Equal Protection of Parents

A reciprocal argument against allowing a parent to use spiritual healing to treat his or her minor child is that to do so is to deny equal protection of the law to parents. As previously noted, many states have created "exemption clauses" in their child neglect statutes that allow a parent to use spiritual healing to the exclusion of conventional medical care.[41] However, if one parent is allowed to forgo seeking medical treatment for his or her child in accord with the tenets of the parent's religion, while another parent who does not hold similar religious beliefs may be criminally punished for the same conduct, the laws are being unequally applied. The fact that application or non-application of the law is based solely upon an individual's religion complicates the issue. In *Lemon v.*

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[36] *Prince*, 321 U.S. at 168.

[37] *See id.* at 169.

[38] Finding such powers are limitless would read the Free Exercise Clause out of the US Constitution.

[39] This argument may also be applied to the argument against "exemption clauses." *See* Dwyer, *supra* note 35, at 158-60.

[40] *See id.* (arguing that a constitutionally valid reason for treating these children differently would be one that rested on the interests of the children themselves).

[41] *See* Erin E. Treene, *Prayer Treatment Exemptions to Child Abuse and Neglect Statutes, Manslaughter Prosecutions, and Due Process*, 30 HARV. J. ON LEGIS. 135, 140 n.43 (1993) (citing exemptions to child abuse and neglect laws of forty-four states and the District of Columbia).

Kurtzman, the Supreme Court announced that a state may not act in a manner that will excessively entangle it in religious matters.[42] Protection of laws, allowed or disallowed based upon the religion to which a person adheres, would likely be viewed as the very kind of excessive entanglement prohibited by the Supreme Court.

5. Christian Science Doctrine

Some people argue that the Christian Science doctrine itself is not opposed to laws prohibiting a parent from using spiritual healing to the exclusion of medical care.[43] Christian Scientists rely fundamentally on two "textbooks:" (1) the Bible; and (2) *Science and Health with Key to the Scriptures*.[44] The latter was written in 1875 by the founder of Christian Science, Mary Baker Eddy and was intended as a spiritual interpretation of the Scriptures of the Bible.[45] In her writings, Ms. Eddy states:

> I have expressed my opinion publicly as to the pre-cautions [sic] against the spread of so-called infectious and contagious diseases in the following words: — "Rather than quarrel over vaccination, I recommend, if the law demand, that an individual submit to this process, that he obey the law, and then appeal to the gospel to save him from bad physical results. Whatever changes come to this century or to any epoch, we may safely submit to the providence of God, to common justice, to the maintenance of individual rights, and to govern-mental [sic] usages. This statement should be so interpreted as to apply, on the basis of Christian Science, to the reporting of a contagious case to the proper authorities when the law so requires. When Jesus was questioned concerning obedience to human law, he replied: 'Render to Caesar the things that are Caesar's,' even while you render 'to God the things that are God's.' I believe in obeying the laws of the land. I practise [sic] and teach this obedience, since justice is the moral signification of law.[46]

A key principle may be derived from Ms. Eddy's statement: obedience to laws that require conventional medical care does not alter the soundness of spiritual healing.

However, one must not mistake the willingness to obey the law as a sign that spiritual healing is not central to the religion. Spiritual healing is, in fact, central

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[42] *See* 406 U.S. 602, 611-25 (1971). *Cf.* Agostini v. Felton, 521 U.S. 203, 232-33 (1997) (subsuming the "excessive entanglement" prong of *Lemon*, making it only a factor (and not actually a prong) of a two-prong test). It is unclear whether excessive entanglement will be as important in future caselaw. *See* Kiryas Joel Vill. v. Grumet, 512 U.S. 687 (1994).

[43] *See McKown*, 475 N.W.2d 63.

[44] MARY BAKER EDDY, *Inklings Historic*, *in* MISCELLANEOUS WRITINGS 1883-1896 382 (1896).

[45] *See* MARY BAKER EDDY, RETROSPECTION AND INTROSPECTION 27 (1891).

[46] MARY BAKER EDDY, THE FIRST CHURCH OF CHRIST, SCIENTIST AND MISCELLANY 219 (1913).

to the very ideology of Christian Science.[47] The Supreme Court, however, has refused to look at the "centrality" of a belief or a tenet when deciding cases of free exercise of religion.[48] Once a person is found to have a sincere belief in a religion, the court's analysis is ended.[49]

III. THE SUPREME COURT AND THE FREE EXERCISE OF RELIGION

The history of the Supreme Court's decisions in free exercise cases is at best ambiguous and at worst inconsistent.[50] Though once using strict scrutiny in free exercise cases, the Supreme Court has embarked on a path in which strict scrutiny has been abandoned unless the free exercise right infringed upon implicates another fundamental right.[51] Originally enunciated in *Employment Division, Department of Human Resources v. Smith*, these "hybrid" rights are, according to *Smith*, exemplified in cases such as *Wisconsin v. Yoder*[52] and *Cantwell v. Connecticut*.[53] A brief review of relevant caselaw will aid in understanding the Supreme Court's present stance.

A. Reynolds v. United States

Reynolds v. United States is recognized as the Supreme Court's first major decision interpreting the Free Exercise Clause.[54] In *Reynolds*, the Supreme Court addressed whether a state could criminalize bigamy even though bigamy constituted a vital tenant of the Mormon religion.[55] The Court announced for the first time that, while religious beliefs are protected absolutely, actions pursuant to those beliefs are subject to regulation.[56] In support of its determination that

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[47] *See* MARY BAKER EDDY, SCIENCE AND HEALTH WITH KEY TO THE SCRIPTURES 147 (The First Church of Christ. Scientist 1994) (1875). ("The book needs to be *studied*, practice and the demonstration of the rules of scientific healing will plant you firmly on the spiritual groundwork of Christian Science.") (emphasis in original).

[48] *See Smith*, 494 U.S. at 886-87.

[49] *Ballard*, 322 U.S. at 86-88.

[50] *Compare Reynolds*, 98 U.S. 145 *with* Cantwell v. Connecticut, 310 U.S. 296 (1940); Wisconsin v. Yoder, 406 U.S. 205 (1972) *with Smith*, 494 U.S. 872; *Prince*, 321 U.S. 158 *with Yoder*, 406 U.S. 205; *Braunfeld*, 366 U.S. 599 *with* Sherbert v. Verner, 374 U.S. 398 (1963); Thornton v. Caldor, 472 U.S. 703 (1985) *with Braunfield*, 366 U.S. 599.

[51] *See Smith*, 494 U.S. at 881.

[52] 406 U.S. 205.

[53] 310 U.S. 296.

[54] *See* Daniel J. Kearney, *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, 862 (1986).

[55] *See Reynolds*, 98 U.S. at 161-67.

[56] *See id.* at 166-67. This decision marked the beginning of the "belief-action" dichotomy that would endure unaltered for 60 years until *Cantwell*, 310 U.S. at 296.

"religious practices that impaired the public interest did not fall under the protection of the First Amendment,"[57] the Court relied heavily on the Framers' intent, finding the writings of Thomas Jefferson particularly instructive:

> Believing with you that religion is a matter that lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions . . . . I [am] convinced [man] has no natural right in opposition to his social duties.[58]

The Court stated that, should every religiously motivated action be given the protection the appellants sought, "every citizen [would] become a law unto himself."[59] The Court, in limiting the application of the Free Exercise Clause, held that "religious practices that impaired the public interest did not fall under the protection of the First Amendment."[60]

B. Cantwell v. State of Connecticut

In *Cantwell v. State of Connecticut*, a father and two sons, all Jehovah's Witnesses, were convicted of violating a Connecticut statute prohibiting the solicitation of "money, services, subscriptions or any valuable thing for any alleged religious . . . cause" without acquiring a license from a state official.[61] Jesse Cantwell, one of the sons, was also convicted for inciting a breach of the peace.[62] The Supreme Court held that the ban on solicitation, as applied in this case, deprived the defendants of their right to the free exercise of religion.[63] The Court further held that Jesse Cantwell's conviction on the charge of inciting a breach of the peace violated his right to freedom of speech under the First Amendment.[64]

While applying the "belief-action" dichotomy announced in *Reynolds*, the Supreme Court noted that the Free Exercise Clause did, in fact, protect religiously motivated actions, though not absolutely.[65] In its holding, the Court stated: "In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."[66] The Court's expansion of its protection of religiously motivated conduct in *Cantwell*

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[57] Gordon Morris Bakken, Reynolds v. United States, *in* THE OXFORD COMPANION TO THE UNITED STATES SUPREME COURT 734 (Kermit L. Hall et al. eds., 1992).

[58] *Reynolds*, 98 U.S. at 164 (citing Thomas Jefferson's response to the Danbury Baptist Association).

[59] *Id.* at 167.

[60] Bakken, *supra* note 57, at 734.

[61] *Cantwell*, 310 U.S. at 301.

[62] *Id.* at 308.

[63] *See id.* at 303.

[64] *See id.* at 307-10.

[65] *See id.* at 303-04.

[66] *Cantwell*, 310 U.S. at 304.

may have been due to the involvement of two fundamental rights in the case, free exercise of religion and freedom of speech. Despite the Court's willingness to extend some constitutional protection to religiously motivated conduct, the state retained the power to regulate the time, place, and manner of those actions.[67]

C. Prince v. Massachusetts

In contrast to *Cantwell*, the Court held in *Prince v. Massachusetts*, another case dealing with the tenets of the Jehovah's Witness faith, that the state had met its burden under strict scrutiny.[68] In *Prince*, a court convicted Sarah Prince, a Jehovah's Witness, of violating child labor laws.[69] Prince, in accordance with her religious duties, had handed out religious magazines on a local street.[70] Prince brought along her nine year-old niece, who asked to accompany her, to assist her.[71] The Commonwealth of Massachusetts convicted Prince of violating a statute under which no girl under the age of eighteen was allowed sell magazines on the street or in a public place.[72] The Court acknowledged that several fundamental rights were implicated in this case: the free exercise of religion, the right of a parent to raise her child, and the state's interest in protecting the welfare of its children.[73]

In acknowledging the difficulty in balancing the multiple interests involved in *Prince*, the Court noted that "[t]o make accommodation between these freedoms and an exercise of state authority always is delicate."[74] However, the Court found that the state, as parens patriae, had a compelling interest in protecting the welfare of its children.[75] In so holding, the Court, in what has become one of the most famous passages in the free exercise context, stated:

> [T]he family itself is not beyond regulation in the public interest, as against the claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation . . . . 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

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[67] *See id.*

[68] *See* 321 U.S. at 170-71.

[69] *See id.* at 159.

[70] *Id.* at 160-61.

[71] *Id.* at 162.

[72] *Prince*, 321 U.S. at 160-61. The statute read, in part: "No . . . girl under eighteen shall sell, expose or offer for sale any newspapers, magazines, periodicals or any other articles of merchandise of any description, or exercise the trade of bootblack or scavenger, or any other trade, in any street or public place." *Id.* It should be noted that boys were allowed to engage in such conduct under the statute as young as twelve years old. *Id.*

[73] *See id.* at 165-67.

[74] *Id.* at 165.

[75] *See id.* at 170.

themselves.[76]

In affirming Massachusetts' conviction of Prince, the Supreme Court held that the state's actions were "necessary to accomplish its legitimate objectives."[77] Notably, however, while the Court acknowledged that multiple fundamental rights were at issue, it did not use strict scrutiny in this case.[78]

D. Wisconsin v. Yoder

In *Wisconsin v. Yoder*, the Supreme Court again faced a case that concerned multiple fundamental rights.[79] In *Yoder*, Amish appellants argued that a Wisconsin statute compelling the education of children up to age sixteen infringed on their constitutional right to the free exercise of religion and, therefore, that their conviction for violation of that statute was unconstitutional.[80] The Court contended with three different and potentially inapposite interests: (1) a parent's fundamental right to raise his or her child according to the parent's religion; (2) the parent's fundamental right to the free exercise of religion; and (3) the state's clear interest in the education of its children.[81]

Through previous caselaw, the Court implicitly held that it should use a strict scrutiny review when a case involves multiple fundamental rights.[82] However, the Court's rationale in *Yoder*, though perhaps the most expansive reading of the Free Exercise Clause, failed to apply strict scrutiny review.[83] Instead, the Court used a "peculiar" balancing test in which the Court weighed the competing interests against each other.[84] The Court, however, unwilling to release the Free Exercise Clause from its moorings, still required the state to show a compelling interest.[85] In so finding, the Court stated: "The essence of all that has been said and written [on free exercise] is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the Free Exercise of religion."[86] Moreover, while acknowledging that providing public schools was at the "apex" of states' functions, the Court held emphatically that, "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the

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[76] *Id.* at 166, 170.

[77] *Prince*, 321 U.S. at 170.

[78] *See id.* at 167.

[79] *See* 406 U.S. at 207.

[80] *See id.*

[81] *See id.* at 214-15.

[82] *See Prince*, 321 U.S. at 444; *Cantwell*, 310 U.S. at 304.

[83] *See Yoder*, 406 U.S. at 214. *See also* Ronald Kahn, Wisconsin v. Yoder, *in* THE OXFORD COMPANION , *supra* note 57, at 934 -35.

[84] *See* Kearney, *supra* note 54, at 867. *See also Yoder*, 406 U.S. at 214.

[85] *See Yoder*, 406 U.S. at 214-15.

[86] *Id.* at 215.

free exercise of religion."[87]

E. Employment Division v. Smith

Employment Division, Department of Human Resources of Oregon v. Smith made explicit for the first time the idea of the "hybrid" case.[88] In one of its most restrictive holdings in the free exercise context, the Supreme Court declared constitutional an Oregon unemployment benefits law denying benefits to any employee dismissed for misconduct, including the sacramental use of Peyote, a drug used by Native Americans during religious worship.[89] The Supreme Court announced that the First Amendment did not prohibit the Oregon law since it was generally applicable and had only an incidental effect on religion.[90]

Though the *Smith* Court restricted the protections afforded under the Free Exercise Clause considerably, it did not do so without exception. Explaining these exceptions, the Court stated:

> [D]ecisions in which we have held that the First Amendment bars the application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.[91]

Importantly, the *Smith* Court, quoting *Yoder*, spoke particularly to the application of the hybrid classification of a parent's right to direct the religious upbringing of his or her children:

> [T]he Court's holding in Pierce [v. Society of Society of Sisters] stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the state' is required to sustain the validity of the State's requirement under the First Amendment.[92]

The Court thus made clear that when a parent's fundamental right to raise a child in accordance with his or her beliefs is combined with an infringement on the free exercise of religion, the case becomes a hybrid case as defined in *Smith*.

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[87] *Id.* at 220.
[88] *See* 494 U.S. at 882.
[89] *See id.*
[90] *See id.* at 878.
[91] *Id.* at 881.
[92] *Id.* at 882 (quoting *Yoder*, 406 U.S. at 233).

IV. PRESENT ATTEMPTS TO ANSWER THE DILEMMA OF SPIRITUAL HEALING OF MINORS

A. Parents' Rights Approach

There are at least three distinct arguments attempting to answer the question of how to take into account the entirety of rights involved in the issue of spiritual healing.[93] The first argument can be called the "Parents' Rights" approach and centers on the parent's right to the free exercise of his or her religion.[94] This argument states that, even in the most extreme cases, a parent retains the right to choose whether to employ spiritual healing in accord with the tenets of the parent's religion.[95] Seen as strictly a free exercise claim, supporters of this argument do not extend the matter beyond religious principles.[96] In fact, supporters of this argument do not claim the right for other parents for whom the choice in health care is not a matter of religious ideology.[97]

The Parents' Rights approach appears to find some support in *Wisconsin v. Yoder*.[98] As stated previously, the Court in *Yoder* held that an Amish parent had the right to remove his child from public school in accordance with the parent's religion.[99] The Court came to this conclusion despite its finding that public education "ranks at the very apex of the function of the state."[100] Moreover, the opinion crossed over the previously established belief-action dichotomy and held that religiously motivated actions can be afforded constitutional protection.[101]

Problems exist, however, with using *Yoder* as the main support for the Parents' Rights approach to spiritual healing. First, the context in which the Court decided *Yoder* is somewhat singular. According to the Amish faith, adherents do not take part in politics or state affairs,[102] choosing instead to remain in their own communities, being wholly self-sufficient and apart from society.[103] It was under these unique circumstances that the Court was able to find that an education up to the eighth grade, followed by whatever home schooling the Amish determined necessary, was sufficient to prepare Amish children for life in their community.[104] Furthermore, notwithstanding the Court's high ranking of the state's interest in education in *Yoder*, one can argue that the health and welfare of a child is a

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[93] *See* Dwyer, *supra* note 35, at 158-60, 161.
[94] *See id.* at 161.
[95] *See id.*
[96] *See id.*
[97] *See id.*
[98] *See Yoder*, 406 U.S. at 220.
[99] *See id.* at 236.
[100] *Id.* at 213.
[101] *See id.* at 220.
[102] *See id.* at 217.
[103] *See Yoder*, 406 U.S. at 217.
[104] *See id.* at 234-35.

substantially higher state interest than is education. Given the possibility of severe injury or death of a child in the spiritual healing context, *Yoder*, the Court's most expansive reading of the Free Exercise Clause, seems poor support for the idea of unfettered free exercise of religion with respect to spiritual healing.

The Parents' Rights argument appears unlikely to succeed on other grounds as well. First, it is unworkable. It is not difficult to imagine the types of treatment children might have to endure at the hands of parents who would abuse the right to an unmitigated free exercise of religion. Taken to its logical extreme, under the Parents' Rights argument, the "sacrifice" of a child would become legal.[105] Second, the Supreme Court has ruled that a parent may lose his or her right to free exercise, even short of the most extreme cases.[106] So, while parenting is a fundamental right, it is not absolute and must yield in certain circumstances.[107]

B. Utilitarian Approach

Another attempt at answering the present question can be described as the "utilitarian approach" or "pure" balancing test. [108] This balancing approach differs from the "compelling interest" approach the Court uses beginning in *Yoder*.[109] Under this approach, weights are assigned to the differing rights of the parent, the child, and the state.[110] The weights vary, depending on the severity of the circumstances.[111] For example, a severely ill child would receive more weight vis-à-vis a parent's right in free exercise than would a less severely ill child.[112] After the appropriate weights are assigned to each interest, they are balanced.[113] In balancing these interests, a state creates "guidelines requiring parents to secure medical care for some illnesses and injuries but not for others."[114]

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[105] Some religions believe in not providing medical care because it is "God's will" should the child die. The child's life, therefore, is sacrificed to the will of God. This is not the view of Christian Scientists. *See* EDDY, *supra* note 47, at 141-42. This example, instead, is solely intended to show the unmanageability of the Parent's Rights approach.

[106] *See Prince*, 321 U.S. at 165.

[107] *See id.* at 170; *see also Yoder*, 406 U.S. at 214.

[108] *See* Dwyer, *supra* note 35, at 153.

[109] *See Yoder*, 406 U.S. at 215.

[110] *See* Dwyer, *supra* note 35, at 153.

[111] *See id.*

[112] *See id.*

[113] *See id.*

[114] *See id.* at 153-54 ("For very minor ailments—a cold, perhaps, or a small cut—the State might rationally conclude that a compelling violation of religious commands would cause more harm than it prevented, when everyone's interests are taken into account. At the other extreme, where life-threatening, but treatable, problems arise—meningitis or a serious accident—the state [sic] would rationally conclude that it would do more good than harm, when everyone's interests are taken into account, to require parents to secure medical care.").

While this approach may provide a certain intellectual satisfaction, it does not prove entirely satisfactory in its results. First, it is extremely difficult for a state to legislate these guidelines.[115] For instance, how would a state list the literally hundreds, if not thousands, of possible ailments and categorize them into severities? Moreover, can an individual be expected to know when a child has a particular listed illness? A parent might not have the ability to distinguish between a severe cold and a mild flu, and if the flu were to become severe, a parent could be prosecuted for not bringing the child to a physician earlier. Parents would be forced to bring their children to the physician whenever they suspected an illness, no matter how seemingly innocuous, causing parents to visit physicians more often. This effect would defeat the very purpose of balancing the interests. The state's interest under this approach would dominate, notwithstanding any attempt to weigh any other interests involved.

This approach also ignores the fact that the importance of fundamental rights is not, as a practical matter, variable. While it might be appropriate to inquire as to which right is more fundamental, using the "pure" balancing approach ignores the "compelling interest" test previously announced by the Supreme Court.[116] For these reasons, no court is likely to adopt this approach.

C. Children's Rights Approach

What might be called the "Children's Rights" approach contends that the child's rights alone are important and no other rights should be considered.[117] It is argued, with some merit, that an ill child is the best "candidate for being a right-holder in this context."[118] Under this approach, one author, James Dwyer, notes that society would never "have legal decisions or . . . arguments regarding the medical treatment of elderly [or] incompetent persons turn on the rights of family members."[119] Dwyer points out that disabled adults who never achieve competency, even those still in the care of their parents, have the right to make decisions about their care based on their best interest without regard to the religious beliefs of either their parents or caretakers.[120] Dwyer concludes that "there is no good reason why children should not have the same right."[121]

Id. at 153-54.

[115] *See* Dwyer, *supra* note 35, at 153.

[116] If the weight assigned to a fundamental right was low enough relative to a state's interest, under the balancing approach a state would not need a compelling interest to outweigh the fundamental right. It would only require a greater relative weight. This approach, therefore, does away with the fundamental nature of the rights being discussed.

[117] *See* Dwyer, *supra* note 35, at 158. This method allows for the states' rights, but these rights are viewed as directly aligned with those of the child.

[118] *Id.* at 156.

[119] *See id.*

[120] *See id.* at 156-57.

[121] *Id.* at 158.

While Dwyer provides an excellent argument, it seems to find applicability only in the context of elderly or incompetent individuals. The argument seems to ignore a parent's fundamental right to parent, as previously announced by the Supreme Court in *Yoder*.[122] This right is not present in the context of elderly or incompetent individuals. Moreover, the Children's Rights approach begins from the premise that no person has any rights other than the child.[123] Therefore, while Dwyer's argument reminds us to be critically aware of a child's needs, it does not prove instructive in the present context.

Based on the above discussion, it is unlikely courts will follow the "Parents' Rights," "Utilitarian," or "Child's Rights" approaches. Instead, another option is available that uses current Supreme Court doctrine, allows for the protection of the child, and does not strip the parents of their fundamental rights: strict scrutiny.

V. A NEW IDEA, AGAIN: STRICT SCRUTINY

The Supreme Court has repeatedly stated that religious beliefs are inviolate.[124] It could be argued that these holdings put religious beliefs even above strict scrutiny, such that the government's interests will never be sufficient to defeat an individual's freedom to believe as his or her conscience mandates.[125] Religious actions, however, constitute a different matter. While subject to strict scrutiny, the Supreme Court has developed a somewhat distinct use of strict scrutiny regarding the Free Exercise Clause.[126] The Court uses a two-step analysis in determining if the right to the free exercise of religion has been infringed.[127] The first step of the analysis looks to whether an individual's beliefs are sincere and whether a governmental restriction burdened his or her free exercise of religion.[128] When both elements of the first step are met, the burden of proof shifts to the government to show that the government has a compelling interest and "that the regulation [in question] is necessary to achieve that compelling interest and the means chosen are the least burdensome on the claimant's rights."[129]

While the compelling interest test was created to address governments' infringement on free exercise, it is unclear, after *Smith*, whether this test applies to cases involving spiritual healing. As mentioned above, *Smith* stands for the proposition that a law of general applicability, neutral on its face, will not be found to infringe on the right of free exercise when its effect on religion is only

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[122] *See* 406 U.S. at 215.
[123] *See id.*
[124] *See, e.g.*, *Reynolds*, 98 U.S. at 161.
[125] *See Cantwell*, 310 U.S. at 303-04.
[126] *See* Steckler, *supra* note 8, at 490.
[127] *See id.*
[128] *See id.*
[129] *Id.*

incidental.[130] This holding seems particularly applicable to spiritual healing cases in which child neglect and manslaughter laws are often implicated.[131] Both child neglect and manslaughter statutes are religiously neutral and generally applicable. Further, both types of statutes have only an incidental effect on religion; it is not the purpose of the law to infringe upon an individual's right to free exercise. Therefore, the regulations, having passed the *Smith* test, cannot be held to violate the free exercise of religion. But is this, in fact, the case?

While *Smith* stands for the premise that a generally applicable law, neutral on its face, does not infringe upon the First Amendment, the holding actually developed beyond this,[132] creating a category of cases to which its restrictive view is inapplicable.[133] The Court called these "hybrid" cases.[134] A hybrid case, according to *Smith*, is a case that implicates multiple fundamental rights.[135] *Smith* explicitly identified *Yoder*, noting the multiple fundamental rights at stake of both the parent and child, as just such a hybrid case.[136] As in *Yoder*, the issue of spiritual healing also involves the multiple fundamental rights of the parent and the child. Therefore, pursuant to *Smith*, courts must consider spiritual healing challenges as hybrid cases. Because spiritual healing cases are hybrid cases, such cases must, like other hybrid cases, be given the protection of strict scrutiny.

It might be argued, however, that the issue of spiritual healing is not, in fact, a hybrid case; that for a hybrid case to exist, the second fundamental right involved must be the child's right and not that of a third party, such as the parent's right. This, however, does not appear to be true. In *Yoder*, the Supreme Court allowed the rights of a third party, the parent, to be implicated, thereby producing a hybrid claim.[137] As such, the circumstances of a spiritual healing claim places it squarely within the definition of a hybrid case.

VI. THE AFFECT OF DIFFERING RELIGIOUS BELIEFS OF PARENT AND CHILD IN A HYBRID CASE

Notably, although it has been typified as a hybrid case, the religious views of the parent and child in *Yoder* were in accord with each other.[138] However, what if a parent's and child's religious views are not in accord? It is possible, after all, that a child will have his or her own religious views that differ from those of the parent. The matter becomes more complex as the minor draws nearer to the age of maturity because of the stronger likelihood of the child holding deep religious

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[130] *See* 494 U.S. at 885.
[131] *See id.*
[132] *See generally id.*
[133] *See id.* at 881.
[134] *Id.* at 882.
[135] *See id.* at 881-82.
[136] *See Smith*, 494 U.S. at 881.
[137] *See* 406 U.S. at 215.
[138] *See id.* at 231-32.

beliefs.

In this debate, the Supreme Court has itself seemingly refused to answer the question.[139] In dicta, the Court in *Yoder* stated:

> [We] . . . in no way determine[] the proper resolution of possible competing interests of parents, children, and the State in an appropriate state court proceeding in which the power of the State is asserted on the theory that Amish parents are preventing their children from attending high school despite [the child's] expressed desires to the contrary. Recognition of the claim . . . would, of course, call into question the traditional concepts of parental control over the religious upbringing and education of their minor children recognized by this Court's past decisions . . . . It is clear that such an intrusion by the State into family decisions in the area of religious training *would give rise to grave questions of religious freedom comparable to those raised here* and those presented in Pierce v. Society of Sisters . . . . On this record we neither reach nor decide those issues.[140]

So while the Court expressed concern, the question of whose rights are considered superior remains explicitly unanswered.[141] Some guidance on this issue, however, may be gleaned from separate caselaw. If one, for the sake of argument, excludes the parent's fundamental rights claims as applicable to a hybrid case, the remaining rights involved are the child's right of free exercise, the child's right to life, and the state's interest in the welfare of the child.[142] In such a situation, three possible outcomes exist: (1) the child wishes to seek medical care; (2) the child does not wish to seek medical care; or (3) the child is not allowed to choose.

If, under the first possibility, a child wishes to seek medical care, no caselaw applies, hybrid or otherwise. The state will have achieved its goal of having the minor gain medical care and would neither file nor continue a suit. The application of *Smith* would be irrelevant.[143]

However, what if the minor child chooses not to seek medical care? If a minor is considered mature enough to hold a right in his or her own religious beliefs, it is arguable that a court would find him or her mature enough to make his or her own medical decisions.[144] In such a case, the Supreme Court has held, in *Cruzan*

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[139] *See id.*

[140] *Id.* (emphasis added). The religious freedoms raised in *Yoder* were those of the parent and not of the child.

[141] *See id.*

[142] *See Prince*, 321 U.S. at 166 (citing Meyer v. Nebraska, 262 U.S. 390 (1923)).

[143] It is unclear at what age such a decision would be allowed by a minor. It would seem logical, however, that as a child nears the age of maturity, the likelihood increases. While no federal cases appear on point, some state cases have held just such a result. *See, e.g.*, Zummo v. Zummo, 574 A.2d 1130, 1149 (Pa. Super. Ct. 1990) (noting that while no bright-line rule exists with regard to age of maturity for purposes of religious identity, children over twelve were considered mature while children under twelve generally were not).

[144] It would appear unlikely, in a case such as this, that a court would be willing to hold

by Cruzan v. Director, Missouri Department of Health, that when an individual has been found to be of age, he or she is free to choose for him or herself whether to seek medical care.[145]

While this, too, would seemingly make the use of *Smith* unnecessary since such a case would itself present a hybrid matter.[146] Two fundamental rights, the right of free exercise and the right to life (or reciprocally, the right to refuse medical care) are both present.[147] If a state decides to challenge the minor's choice, it must confront two issues: (1) the already established precedent of *Cruzan*; and (2) the use of *Smith*, as argued herein. As a child nears the age of maturity, it would seem increasingly unlikely that the state could win such a challenge.[148]

Under the final possibility, when a minor is not allowed to make a decision, two feasible outcomes exist: (1) the minor agrees with the state's decision to enforce medical care requirements; or (2) the minor does not. If the child agrees with the state's requirements, the result is the same as under the first possibility; there is no case since the child (or guardian) will have no cause to file suit. However, should a minor disagree with the state's decision, the child, unable to make his or her own choice, will be forced to forgo his or her religious beliefs.

To arrive at such a situation, it has been assumed that the parent's rights are irrelevant to a hybrid case, but now, so are the minor's. In other words, in a matter that originally involved several fundamental rights, it is now only the state's rights that are valued. This would seem inconsistent with the purposes of the Constitution.[149] Moreover, as previously stated, the Court has seemed unwilling to allow the state so much control.[150] The Court in *Yoder* held:

> [I]t seems clear that if the State is empowered, as parens patriae, to 'save' a child from himself or his . . . parents . . . the State will in large measure influence, if not determine, the religious future of the child. [The] primary

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a minor mature enough to respect his or her religious beliefs but not his or her medical choices. This seems unlikely because the court would be aware that the child's religious choice would inherently implicate a medical decision and would thus be, for practical purposes, inseparable. *See* In re E.G., State of Illinois v. E.G., 549 N.E.2d 322, 325 (Ill. 1990) (finding a seventeen year-old minor sufficiently mature to establish a religious identity and, therefore, able to refuse life-saving medical treatment). *But see* Commonwealth v. Cottam, 616 A.2d 988, 999 (Pa. Super. Ct. 1992) (distinguishing a mature minor's ability to possess a religious identity as different from the ability to refuse life-saving medical treatment).

[145] *See* 497 U.S. 261, 289 (1990).

[146] It would make the use of *Smith*, as applied to a hybrid matter, irrelevant since the decision could likely be made on an individual's right to refuse medical care.

[147] *See* Washington v. Glucksberg, 521 U.S. 702, 744 n.11 (1997) ("The Court has referred to such decisions [to refuse medical care] as implicating 'basic values' and being 'fundamental' . . . .").

[148] *See In re E.G.*, 594 N.E.2d at 325.

[149] *See* Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the state . . . .").

[150] *See id.*

> role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition. In Pierce v. Society of Sisters . . . [this] . . . Court observed: 'The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children . . . [t]he child is not the mere creature of the State.'[151]

Clearly, the Supreme Court is unwilling to allow the state such control.[152] Ultimately, then, to prevent this cascade of rights, the Supreme Court must hold that even if the child's rights and the parent's rights are not in accord, the parents rights will still be considered applicable in determining the existence of a hybrid case. To remove the parent's rights from the equation, knowing the child's right to free exercise will not be given effect, would be the equivalent of allowing the state to raise children whenever it does not like their parents' choices. This is something the Court appears unwilling to do.[153]

Given the above analysis, it appears unlikely that the Supreme Court will be willing to remove the rights of a parent, or the rights of both the parent and child, and supplant them with states' rights. Therefore, because a spiritual healing case is a hybrid case under *Smith*, the Court is required to use strict scrutiny in weighing the interests of the state against those of both the children and the parents.[154] In so doing, the Court will be able to reach a result in which the child's fundamental right to life, inarguably the most important right in the present matter, will be protected, while still allowing a parent the rights of free exercise and parenthood.

VII. THE APPLICATION OF STRICT SCRUTINY TO SPIRITUAL HEALING

The Supreme Court has admittedly "struggled to give the [Free Exercise Clause] content in light of the prominent social concerns inherent in defining the Clause."[155] But what if the Court was able to protect these social concerns and still maintain such protection as had been previously afforded, even in a matter as delicate as the spiritual healing of minors? It would seem prudent to provide as much protection as possible for fundamental rights while still affording protection commensurate with the strong interests of the state in the welfare of its minor citizens. This Article suggests that the Court may accomplish this, as is required under precedent, by the application of strict scrutiny in spiritual healing cases.

A. Severe Illness or Injury

There are several different situations in which spiritual healing and state laws

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[151] 406 U.S. at 232 (quoting, in part, *Pierce*, 268 U.S. at 535-36).

[152] *See id.*

[153] *See* 406 U.S. at 232.

[154] *See Smith*, 494 U.S. at 885.

[155] Kearney, *supra* note 54, at 862.

come into conflict. In applying strict scrutiny to such situations, courts can find a result that is appropriate in all circumstances. The first situation might be considered among the easiest for courts to deal with under strict scrutiny: a severely ill or injured child who stands a substantial likelihood of permanent injury or death. In following the Court's previous strict scrutiny analysis in free exercise cases, a sincerity of belief must first be established.[156] For the present purposes, this Article assumes that, in every instance, that requirement has been met. Further, this Article assumes that the second requirement, a state's burden upon free exercise, has also been met.[157] This brings us to the state's compelling interest. Because the state clearly has a compelling interest in seeing to the welfare of its children, this element too has been met. This leaves only the last element of strict scrutiny, the "least restrictive means" requirement.[158] If a child is about to die, it appears clear that his or her right to life takes precedence over all other rights. The least restrictive means will likely take the form of a state ordering a parent to seek medical care for the minor child. While this is clearly an infringement of the free exercise of religion, the state is not prohibited from infringing upon this right; it is only required to do so in the least restrictive manner. In this case, requiring the parent to seek medical care appears the least burdensome means of meeting the government's clearly compelling interest.

B. Minor Illness or Injury

The opposite of this extreme example is when a child has only a minor illness or injury. A state's compelling interest appears much lower in this case. Although a state may well have some interest in the welfare of a child even in this instance, it is not as substantial as in the previous scenario. When a minor illness or injury exists, the state's interest is almost entirely outweighed by a parent's fundamental rights to the free exercise of religion and to parenthood; the parent should be free to use spiritual healing according to his or her religious tenets. To hold otherwise would be to follow the rationale that a parent has virtually no right whatsoever in the free exercise of religion or in parenthood. Doing so completely ignores the fundamental nature of those rights. While it may be argued that even a minor injury or illness can progress into something life threatening, such progression would no longer allow the above situation to exist. This progression would bring us to the next, and perhaps most difficult, situation.

C. A Moderate or Progressively Ill Child

Assume a situation that might be considered a moderate illness or injury or a minor illness or injury that progresses in severity.[159] How, in such a situation,

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[156] *See* Steckler, *supra* note 8, at 490.

[157] *See id.*

[158] *See id.*

[159] For purposes of this argument, this situation will also include situations that, while

can a court balance both the states' and the parents' rights? This circumstance might best be seen as a continuum with the states' rights increasing and the parents' rights decreasing as the illness or injury progresses in severity. But this, too, can be handled using strict scrutiny. The first requirement is to find where on the continuum the illness places the rights. Is the illness a minor cold, where a parent might not have foreseen possible complications?[160] Is this a situation where a parent *might* have been concerned? Or is this a case in which the child has been progressively deteriorating for weeks and spiritual healing has been clearly ineffective?

Once these facts are determined, the court must determine whether the state has acted in the least restrictive means to address the situation, given the location of the actions on the continuum. Importantly, the present matter would be extremely difficult to legislate. However, like so many other matters difficult to legislate, *i.e.*, pure negligence, a jury's judgment would be used to determine where on the continuum the questioned actions fall.[161] Should appeals follow, the appellate courts, and hopefully the Supreme Court, will look carefully to determine whether the legislature has used the least restrictive means when creating statutes under which parents are prosecuted. So long as strict scrutiny is used to enforce this requirement, courts will find themselves able to balance the multiple interests involved in this complex matter.

VIII. CONCLUSION

The current situation of declining protections in the free exercise context is troubling. Under the precedent set forth in *Smith*, however, it is clear that the application of strict scrutiny is required in cases of spiritual healing. With disciplined application, strict scrutiny will, first and foremost, protect the child's health and welfare. Further, it will allow for such protection while minimizing infringement upon the fundamental rights of free exercise and of parenting. Therefore, the Supreme Court should utilize this appropriate and required test. If it does not, the Court will unnecessarily derogate fundamental rights.

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not life threatening, involve a child in a substantial amount of pain.

[160] The standard of care used in determining negligence in such situations has been determined by some courts to be that of "a reasonable Christian Scientist." *See, e.g.*, *McKown*, 475 N.W.2d at 63. The jury, therefore, would have to use that viewpoint in convicting a Christian Scientist of criminal negligence. *See id.*

[161] *See id.*