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Towards a New Lens of Analysis: The History and Future of Religioius Exemptions to Child Neglect Statutes

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TOWARDS A NEW LENS OF ANALYSIS: THE HISTORY AND FUTURE OF RELIGIOUS EXEMPTIONS TO CHILD NEGLECT STATUTES

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I. INTRODUCTION

Every year, many children die of afflictions that are, at their core, completely treatable. They are allowed to succumb to these diseases and conditions—some as benign as a curable intestinal blockage[1]—solely because their parents subscribe to a religion that forbids them from visiting a doctor or seeking treatment at a hospital. Instead, they seek spiritual treatment through prayer and ritual. This is arguably within the liberty interests of adults, but when children are involved, the situation is much more complicated.

Every state has enacted statutes to prevent child abuse. In Virginia, for instance, "[a]ny parent, [or] guardian,... who by willful act or omission or refusal to provide any necessary care for the child's health causes or permits serious injury to the life or health of such child shall be guilty of a Class 4 felony."[2] In addition to preventing active abuse, this statute is notable for criminalizing inaction. The Child Abuse Prevention and Treatment Act federally mandated these statutes in 1974,[3] along with a requirement that an exemption for religious belief be included. Though the requirement for exemption has since been lifted, many states still have them in force.[4] It is

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1. *See* SHAWN FRANCIS PETERS, WHEN PRAYER FAILS: FAITH HEALING, CHILDREN, AND THE LAW 177-78 (2008). The child, 13-year-old Sandra Kay Arnold, could have been saved by a simple surgery up to twelve hours before her death. *Id.*

2. VA. CODE ANN. § 18.2-371.1(A).

3. The Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, 88 Stat. 4 (codified as amended at 42 §§ 5101-5119c (2003)).

4. Child Abuse and Neglect Prevention Treatment Program, 45 C.F.R. § 1340.2 (1983).

largely these exemptions that allow for children to die without ever seeing a doctor.

The exemptions are roundly criticized, and these criticisms are often couched in Establishment Clause jurisprudence. This clause prohibits the government from awarding precedence, favor, and legal exemption to certain religious groups.[5] This criticism is a strong one, but has flaws. A better way of looking at these exemptions is through the lens of the Equal Protection Clause.[6] Simply put, exemptions create one class of children who are not awarded the same legal protections as another class, violating their constitutional rights and endangering their lives.

In order to analyze the religious exemptions, this paper will begin with their history. Part II looks at the Child Abuse Prevention and Treatment Act of 1974 (CAPTA) the statute that precipitated their spread, as well as the justifications that it was bolstered upon: Free Exercise of religion and parental rights. The Equal Protection critique follows as Part III, followed by Part IV that discusses the traditional critique, grounded in the Establishment Clause. In Part V, the article will finish with an explanation of why the Equal Protection critique is a much stronger criticism.

II. THE HISTORY OF AND JUSTIFICATIONS FOR EXEMPTIONS

A. CAPTA and Its Aftermath

In 1974, Congress confronted the inconsistent standards of child abuse and neglect statutes across the country by unifying them into one national standard; this was accomplished through CAPTA.[7] The Act did not contain specific exemptions for religious purposes, but was rather left to the judgment of the Department of Health, Education and Welfare (HEW).[8] Now known as the Department of Health and Human Services, the agency "interpreted [the act] as requiring an exemption from child neglect liability for parents who treated their children by faith healing. Thus, HEW required the states to adopt religious exemptions before they could receive federal

5. U.S. CONST. amend I.

6. U.S. CONST. amend XIV, § 1.

7. Child Abuse Prevention and Treatment Act, *supra* note 3.

8. J. T. Gathings, *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, 591 (1989).

funding for state child-protection programs."[9] The states followed suit accordingly, enshrining in their various codes language such as the following: "[A] minor child who in good faith is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination shall not for that reason alone be considered [an abused or neglected child]."[10]

Since the 1974 regulation, the Department has changed its position drastically. In 1983, new regulations were adopted, striking down the exemption requirement: "nothing in the federal rule should be construed as requiring or prohibiting a finding of neglect when a parent practicing his or her religious beliefs does not, on that basis alone, provide medical treatment for his or her child."[11] Four years later, a regulation was promulgated that clarified even further:

> Previous regulations for this program required that State statutes contain a provision that, when parents or guardians provide spiritual or other forms of remedial health care, they should not, for that reason alone, be considered negligent parents. This requirement was deleted in the final rules published January 26, 1983. [S]uch an eligibility requirement was not required by the Act and thus should not be imposed by Federal regulation.[12]

It would seem as though this language is relatively straightforward and would pave the way for repeal of these exemptions. Conventional wisdom

9. *Id.*; *see* Child Abuse and Neglect Prevention and Treatment Program, 45 Fed. Reg. 43,936, 43,937 (Dec. 19, 1974) ("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 . . . .").

10. VA. CODE ANN. § 18.2-371.1(C) (2001); *see* Rita Swan, *On Statutes Depriving a Class of Children of Rights to Medical Care: Can This Discrimination Be Litigated?*, 2 QUINNIPIAC HEALTH L.J. 73, 81 nn.47–48 (1998) (listing many other statutes).

11. 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, 332 (1991). *See* Child Abuse and Neglect Prevention and Treatment Program, 45 C.F.R. § 1340.2(d)(3)(ii) (1983) ("[N]othing 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 . . . .").

12. Child Abuse and Neglect Prevention and Treatment Program, 52 Fed. Reg. 3990, 3993 (Feb. 6, 1987) (to be codified at 45 C.F.R. pt. 40).

says, however, that once in place, laws are very hard to repeal.[13] As such, only a handful of states have amended their statutes, including Colorado, Oklahoma, and South Dakota.[14]

B. Justifying Exemptions

1. Free Exercise

The primary motivation for these exemptions is grounded in the Free Exercise Clause of the First Amendment. "Congress shall make no law...prohibiting the free exercise [of religion]."[15] A compelling argument and reasoning for this protection is rooted in the writings of the so-called "Father of the Constitution,"[16] James Madison. In his famous *Memorial and Remonstrance Against Religious Assessments*, Madison wrote:

> The Religion then of every man must be left to the conviction and conscience of every man.... Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us.[17]

The question of free exercise and exemptions is relatively settled vis-à-vis competent adults. Given "the fundamental premise that everyone has the inherent right to control their own person,"[18] it is readily accepted that

13. Some argue that the Christian Science Church, a strong faith-healing sect, has a near-unlimited lobbying arm, which exerts significant pressure on the legislature and helps keep these protections in place. *See* Kei Robert Hirasawa, Note, *Are Parents Acting In the Best Interests of Their Children When They Make Medical Decisions Based on Their Religious Beliefs?*, 44 FAM. CT. REV. 316, 318 n.31 (2006) ("[T]he Christian Science Church . . . maintain[s] a salaried lobbyist in every state and besieg[es] legislators with letters, calls, and visits from church members."); Scott St. Amand, *Protecting Neglect: The Constitutionality of Spiritual Healing Exemptions to Child Neglect Statutes*, 12 RICH. J. L. & PUB. INT. 139, 147 (2009) (observing "lobbying by the coordinate mass of Christian Scientists"); Allison Ciullo, Note, *Prosecution Without Persecution: The Inability of Courts to Recognize Christian Science Spiritual Healing and a Shift Towards Legislative Action*, 42 NEW ENG. L. REV. 155, 170 (2007) ("[E]xemptions are often the result of extensive lobbying campaigns and debates by politically active Christian Scientists.").

14. COLO. REV. STAT. § 193-103(1) (2008); OKLA. STAT. tit. 21, § 852(C) (2002 & Supp. 2009); S.D. CODIFIED LAWS § 26-10-1.1 (Supp. 1990).

15. U.S. CONST. amend. 1.

16. *See* About The White House, Presidents: James Madison, http://www.whitehouse.gov/about/presidents/jamesmadison (last visited December 4, 2009) ("[i]n later years, . . . he was referred to as the 'Father of the Constitution.'").

17. David E. Steinberg, *Children and Spiritual Healing: Having Faith in Free Exercise*, 76 NOTRE DAME L. REV. 179, 190 (2000) (citing 2 JAMES MADISON, *Memorial and Remonstrance Against Religion Assessments*, *in* THE WRITINGS OF JAMES MADISON 183, 184, 186 (Gaillard Hunt ed., 1901)).

18. Julie E. Koehne, Comment, *Witnesses on Trial: Judicial Intrusion Upon the Practices of Jehovah's Witness Parents*, 21 FLA. ST. U. L. REV. 205, 208 (1993) (citing *In re* Guardianship of Browning, 568

"a competent individual has a constitutionally protected right to refuse medical treatment regardless of his or her medical condition"[19] – a right that is not changed if religion is involved.

In the American spectrum of religions, some sects rely solely upon prayer to heal medical needs. A major example is that of the Church of Christ, Scientist, commonly known as the Christian Science church. The church was founded in the late nineteenth century, and teaches that "diseases and sickness are manifestations of the mind that can be overcome only by praying and drawing closer to God."[20] Specific healing counselors are appointed and trained in the church's way, and are called upon to provide assistance in medical emergencies.[21] Believers argue that in order to fully practice their religion, they must not be forced to take their children to doctors.[22]

The Jehovah's Witnesses are in a similar situation. Founded in 1876,[23] the Witnesses do not have an outright ban on medical care or visits to doctors and hospitals, but they do "generally refuse to take blood transfusions even when these are judged by physicians to be absolutely necessary for the preservation of life and health."[24] This refusal is "based upon what they believe to be the Bible's prohibition against 'eating blood.'"[25] They remain committed to this belief despite any outsiders' arguments.[26] Again, followers argue that if they were required to take their children to doctors or hospitals, and their conditions necessitated a blood transfusion – an increasingly common procedure for any number of afflictions – it would interfere with their ability to fully practice their religion.[27]

So.2d 4, 10 (Fla. 1990)).

19. *Id.*

20. Elizabeth Lingle, *Treating Children by Faith: Colliding Constitutional Issues*, 17 J. LEGAL MED 301, 306.

21. *See* Comment, *Commonwealth v. Twitchell:* Who Owns the Child? 7 J. CONTEMP. HEALTH L. & POL'Y 413, 423 (1991).

22. *See* Lingle, *supra* note 20, at 306.

23. Koehne, *supra* note 18, at 207.

24. John C. Ford, *Refusal of Blood Transfusions by Jehovah's Witnesses*, 10 CATH. LAW. 212, 212 (1964).

25. Koehne, *supra* note 18, at 207 & n.14 (citing various biblical provisions relied upon by Witnesses).

26. *See* Ford, *supra* note 26, at 212 ("If it is objected that this was a *dietary* law, having nothing to do with the medical use of blood, they reply that a transfusion is the equivalent of eating; it is intravenous feeding.").

27. *See id.* at 215.

In addition to these two major sects with religiously based aversion to doctors, numerous fringe groups exist. One example is the Followers of Christ Church, located in Oregon City, Oregon.[28] This church has created a small uproar in its community for over a decade.[29] In 1998, the state's medical examiner alleged that "the faith-healing congregation's avoidance of doctors and hospitals may have cost the lives of 25 children, some under excruciating circumstances."[30] In the decade since, there have been more deaths, including 15-month-old Ava Worthington, who died in 2008 of bacterial pneumonia and a blood infection.[31] These conditions were treatable, but her family merely prayed for her recovery, "never [seeking] medical treatment or call[ing] 9-1-1, not even when [the child] stopped breathing."[32] This led to the conviction of her father for second-degree criminal mistreatment in the summer of 2009, with another family to face trial in January 2010.[33]

Another church is the Unleavened Bread Ministries, based mostly on the Internet.[34] This church came under scrutiny for the death of 11-year-old Madeline Kara Neumann, who died on Easter Sunday of 2008 of untreated diabetes, a common and manageable condition.[35] Her parents were convicted of second-degree reckless homicide in August, 2009, and "were ordered to spend 30 days in jail each year for the next six years and were placed on 10 years' probation."[36] These small churches, some with no more

28. Jonathan Turley, *When a Child Dies, Faith is No Defense*, WASH. POST, Nov. 15, 2009, at B1.

29. *See id.*

30. Steinberg, *supra* note 17, at 179–80 (quoting David Van Biema, *Faith or Healing? Why the Law Can't Do a Thing About the Infant-Mortality Rate of an Oregon Sect*, TIME, (Aug. 31, 1998) at 68).

31. Turley, *supra* note 28 at B1.

32. Steve Mayes, *Jurors' Empathy Led to 'Epiphany'*, OREGONIAN (Portland, Or.) July 24, 2009.

33. *See* Rick Bella, *Faith Healer Gets Jail Time*, OREGONIAN (Portland, Or.), August 1, 2009.

34. Scott St. Amand, *supra* note 13, at 139–40. This church teaches:

> We are not commanded in scripture to send people to the doctor but to meet their needs through prayer and faith . . . . [W]e are not against doctors for those who have their faith there and never condemn or restrict them in any way. But we know that the best one to trust in for healing is Jesus Christ.

Press Release, David Ellis, Press Release from Unleavened Bread Ministries Regarding the Death of 11 Year-Old Madeline Kara Neumann (Mar. 27, 2008), *available at* http://www.wsaw.com/news/misc/17059725.html (last visited Oct. 11, 2010). *See generally* Unleavened Bread Ministries, http://www.unleavenedbreadministries.org (last visited Dec. 4, 2009).

35. Emma Graves Fitzsimmons, *Wisconsin Couple Sentenced In Death of Their Sick Child*, N.Y. TIMES, Oct. 8, 2009, at A16.

36. *Id.*

than two hundred members, do not have the same prominence or notoriety as the larger sects, but nevertheless argue for their own religious freedoms and for the protections mandated by the Constitution.[37]

2. Parental Rights

Notwithstanding any Free Exercise concerns that may necessitate a religious exemption, many also rely upon secular "parental rights" to support exemptions. Though not grounded in one specific statute or religious tenet, courts have long established that parents have the right to raise their children to meet their particular family's habits and mores.

a. Education

The most common example of parental rights is in the field of education. A 1925 case, *Pierce v. Society of Sisters*, established the rights of parents to send their children to a private school.[38] An Oregon law was passed, the Compulsory Education Act, "requir[ing] every parent... of a child between eight and sixteen years to send him 'to a public school...in the district where the child resides."[39] The Society of Sisters operated a Roman Catholic school that would necessarily be harmed by the enforcement of this act, and so sued to enjoin its provisions.[40] The Supreme Court found, in a unanimous opinion, that "the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of under their control."[41] Offering a strong endorsement of parental rights, the Court explained that "the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[42] The statute was thus ruled unconstitutional.

Many years later, in *Wisconsin v. Yoder*, the Court again addressed the question of parental rights with regard to education.[43] The Old Order Amish believe in a separatist and traditional way of life, eschewing most interactions with modern society.[44] As such, they elect to keep their

37. Lingle, *supra* note 20, at 309.
38. Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925).
39. *Id.* at 530.
40. *Id.* at 532.
41. *Id.* at 534–35.
42. *Id.* at 535.
43. Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).
44. *Id.* at 210.

children home from school once they have learned basic fundamentals – typically after eighth grade.[45] Wisconsin, however, had a statute mandating school attendance until the age of sixteen, and three families were convicted of violating this statute for keeping their children home.[46]

After acknowledging the precedent of *Pierce*, the Court took a "hybrid rights" theory and held that "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."[47] The State has an interest in setting standards for education, and for ensuring that children reach these standards, but the Amish parents successfully convinced the Court that their upbringing outside of conventional schooling was sufficient to fill the gap.[48] The parental rights coupled with the right to free exercise to carry the day for the Amish. Thus a precedent was born, giving grounds for the argument that hybrid rights should be more protected than singular rights.

b. Safety and Health

The parental rights doctrine, even when coupled with a religious right, isn't necessarily ironclad. This was evidenced by *Prince v. Massachusetts*.[49] Massachusetts had a child labor law that, in part, forbade a child from "sell[ing], expos[ing] or offer[ing] for sale any newspapers, magazines, periodicals or any other articles of merchandise of any description...in any street or public place."[50] The onus for this law was put largely on the parents and legal guardians, as it was to them that punishment would be dealt.[51] Sarah Prince, a Jehovah's Witness, took her young ward into the streets to pass out evangelical literature promoting the Witnesses.[52] She was confronted by a truancy officer, and later convicted

45. *Id.* at 210–11.

46. Interestingly, their fine was a paltry five dollars, possibly but in context might have meant much more. See JAY WEXLER, *Amish Agitation: Destination the Cheese State*, *in* HOLY HULLABALOOS, 59, 64–84 (2009), for a humorous and personable account of *Yoder*, the Old Order Amish, and the Wisconsin town of New Glarus eighty years after the fact.

47. *Yoder*, 406 U.S. at 233.

48. *Id.* at 235 ("[The Amish] have carried the even more difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education.").

49. Prince v. Massachusetts, 321 U.S. 158 (1944).

50. *Id.* at 160–61 (quoting MASS. GEN. LAWS ch. 149, § 69 (1944)).

51. *Id.* at 161 (quoting MASS. GEN. LAWS ch. 149, § 81 (1944)).

52. *Id.* at 159–61.

of violating the labor statute.[53] Appealing her conviction, Ms. Prince argued that her right to free expression, taken in conjunction with her right to bring up the child as she saw fit, gave the state no grounds to interfere.[54]

The state's interest here was not educational but protective, for "an obvious purpose of the statute was to keep children out of [the] potentially dangerous situation[ ]" of vending at night.[55] As in *Yoder*, Ms. Prince argued a hybrid rights theory, but her cause was unsuccessful.[56] The Court found that "[p]arents may be free to become martyrs themselves. But it does not follow that 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."[57] Despite the slightly hyperbolic language, the point resounds that when public safety is an issue, the state has a right to limit parental rights in order to promote "the healthy, well-rounded growth of young people into full maturity as citizens."[58]

The District Court of Washington took on a similar issue in *Jehovah's Witnesses v. King County*, building upon *Prince*'s framework vis-à-vis medical issues.[59] In *King County*, three religious groups brought a challenge to a Washington state statute authorizing courts to take custody of children if their parents refused blood transfusions.[60] In particular, a boy named Jeffrey Elam was injured in an automobile accident.[61] The attending doctors petitioned a court for an order authorizing custody of the boy to the State and for a transfusion procedure if necessary.[62] The court looked to *Prince* for guidance, reiterating the statement that parents may not "make martyrs of their children."[63] While making an important distinction by explaining that "[i]t is true that in Prince, the [Supreme C]ourt made it clear that it did not intend that opinion to lay the foundation for *every* state intervention in the indoctrination and participation of children in religion which may be done in the name of their health and welfare," the district

53. *Id.* at 162–63.
54. *Id.* at 164.
55. James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371, 1380 (1994) [hereinafter Dwyer I].
56. *Prince,* 321 U.S. at 170.
57. *Id.*
58. *Id.* at 168.
59. Jehovah's Witnesses v. King County Hosp., 278 F. Supp. 488 (W.D. Wash. 1967).
60. *Id.* at 491.
61. *Id.* at 497.
62. *Id.*
63. *Id.* at 504 (quoting *Prince*, 321 U.S. at 170).

court held "on the compelling authority of Prince" that the statutes were constitutional. [64] The Supreme Court affirmed the decision, approving the district court's conclusion.[65] Taken together, these cases create a boundary for parental rights: a parent's choices may not "endanger seriously a child's physical health or safety."[66]

III. WHAT'S WRONG WITH EXEMPTIONS

A. Equal Protection, Generally

Religious exemptions are built on the back of the Free Exercise Clause, and, primarily, attacked through the Establishment Clause.[67] Yet beyond this First Amendment-based back-and-forth exists a different approach of analyzing the exemptions. This approach, based upon the Fourteenth Amendment's guarantee of Equal Protection, argues that religious exemptions unconstitutionally create two classes of children: one class protected from neglect, and one unprotected.[68]

The Fourteenth Amendment holds, in part, "[n]o State shall... deny to any person within its jurisdiction the equal protection of the laws."[69] The Equal Protection Clause has become well known as the major player in race-based decisions and the country's gradual move towards racial integration. For example, it was under the auspices of Equal Protection that *Brown v. Board of Education* was decided, striking down segregated schools and opening the floodgates to desegregation in all facets of life.[70]

Establishment Clause questions often depend upon the three prongs of the so-called "*Lemon* Test," requiring an investigation of its purpose, effect, and entanglement,[71] Equal Protection analysis usually turns on the determination of levels of scrutiny. This determination is the method by which a court decides which test should be applied to a challenge.[72] In the

64. *Id.* at 504–05 (emphasis added).
65. *Id.*, *cert. denied,* 390 U.S. 598 (1968).
66. Dwyer I, *supra* note 55, at 1382.
67. *See infra* Part IV.
68. Rita Swan, *On Statute Depriving a Class of Children of Rights to Medical Care: Can This Discrimination be Litigated?*, 2 QUINNIPIAC HEALTH L.J. 73, 93–95 (1998).
69. U.S. CONST. amend. XIV, § 1.
70. Brown v. Board of Educ., 347 U.S. 483, 495 (1954).
71. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).
72. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLE S AND POLICIES 539 (3d ed. 2006).

words of Professor Erwin Chemerinsky, one of the foremost scholars of the Constitution, "[i]n constitutional litigation concerning individuals' rights and equal protection the outcome often very much depends on the 'level of scrutiny' used. The level of scrutiny is the test that is applied to determine if the law is constitutional."[73] There are three different types of analysis: rational basis, intermediate scrutiny, and strict scrutiny.[74] The rational basis test is the least demanding test, and "is the minimum level of scrutiny that all laws challenged under equal protection must meet."[75] The plaintiff in these cases bears the burden of proof, and the challenged law "will be upheld if it is *rationally related* to a *legitimate* government purpose."[76] Statutes are rarely overturned under this standard, for "[t]he rational basis test is enormously deferential to the government."[77]

On the other end of the spectrum, the test is most severe under a strict scrutiny analysis.[78] In order for a statute to survive strict scrutiny analysis, "the court must regard the government's purpose as vital, as 'compelling.'[79] Also, the law must be shown to be 'necessary' as a means to accomplishing the end."[80] The burden is shifted to the state, and "laws generally are declared unconstitutional when it is applied."[81] Interestingly, strict scrutiny analysis can trace its origin largely to a mere footnote in an otherwise-inconsequential case, *United States v. Carolene Products*.[82] At the time, rational basis review was essentially the only standard for Equal Protection analysis, and the multi-tiered approach was not yet fully realized. Justice Stone, writing for the Court, pondered whether there existed situations "which may call for a... more searching judicial inquiry."[83] These situations would be those contemplating "prejudice against discrete and insular minorities... which tend[] seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[84]

73. *See id.*
74. *See id.* at 540-42.
75. *Id.* at 672.
76. *Id.* (emphasis added).
77. *Id.* Of course, a finding of unconstitutionality is not impossible under the "Rational basis" test. In fact, some argue that religious exemptions are unable to satisfy even this low scrutiny, for "they in fact thwart the purpose of the abuse and neglect statues because they result in certain children being deprived of the kind of medical treatment necessary to preserve their lives." Monopoli, *supra* note 11, at 349.
78. CHEMERINSKY, *supra* note 72, at 542.
79. *Id.* at 541.
80. *Id.*
81. *Id.* at 542.
82. United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938).
83. *Id.*
84. *Id.*

Since strict scrutiny analysis is typically reserved for racial minorities (those "discrete and insular minorities"[85] of Justice Stone's phrasing), there exists a gap where those groups who may not qualify for strict scrutiny yet still merit increased protection may fall. For example, discrimination based on gender is usually placed in this middle category.[86] For this reason, there exists an "intermediate" level of scrutiny to serve as a catchall. Intermediate scrutiny is slightly more amorphous, and often is divided in two levels itself. The higher level "requires the state to demonstrate that its action is *substantially* related to a state interest that is both *legitimate and* "*important*.'"[87] The lower intermediate level "requires the state to demonstrate that its action is *substantially* related to a *merely legitimate* state interest."[88]

The determination of whether a group merits strict scrutiny is incredibly important, and thus far, the Supreme Court has declined to extend strict scrutiny to groups based on age.[89] This would seem to indicate that children would not merit this heightened level of protection. Some scholars, however, make a strong case for granting this protection; one such scholar is Professor James Dwyer. His approach is worthy of a full discussion, for it could serve as a strong tactic for challenging exemptions.

B. Equal Protection, Applied: Prof. Dwyer's Approach

There is a traditional understanding in American jurisprudence that children are, in addition to being subjects of their parents,[90] also subject to the protection of the state through the concept of "*parens patriae*." From the Latin for "parent of the country,"[91] this concept "permits the state to intervene in parental decision-making potentially harmful to a minor child."[92] When rights are balanced in juvenile issues, therefore, the balance

85. *Id*.

86. CHEMERINSKY, *supr*a note 72, at 541 ("[I]ntermediate scrutiny is used in evaluating laws involving gender discrimination.").

87. James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321, 1391 (1996) [hereinafter Dwyer II] (citation omitted).

88. *Id.* at 1392 (citation omitted).

89. Ann Massie, *The Religion Clauses and Parental Health Care Decisionmaking for Children: Suggestions for a New Approach*, 21 HASTINGS CONST. L. Q. 725, 731 & n.22 (1994) ("[C]lassifications 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.").

90. This is subject to some limitations; *see supra* Part II.B.

91. BLACK'S LAW DICTIONARY 520 (3d Pocket ed. 1996).

92. Massie, *supra* note 89, at 742.

is between the parent's interest and the state's, acting as *parens patriae*. Professor Dwyer has criticized this approach for leaving out the rights of the children and violating "the moral precept that no individual is entitled to control the life of another person, free from outside interference, no matter how intimate the relationship between them."[93] This is especially true, Dwyer insists, when the control goes against the person's "temporal interests" – ostensibly including medical decisions.[94] He even criticizes court decisions that have ruled in favor of protecting children, for while "societal interests in the welfare of children have often been found sufficiently compelling to trump parental free exercise claims[,]... courts have continued to ignore or minimize the rights and interests of the children themselves."[95]

This makes logical sense, "while competent individuals may justly suffer as a result of their own choices, no one should suffer avoidable harm because of circumstances beyond their control, and particularly not as a result of other people's choices."[96] So how does this principle factor into Equal Protection analysis? It ties directly into the level-of-scrutiny analysis. Using the argument that the rights of the children have been systematically ignored, Dwyer reasons that "children of religious objectors satisfy all of the criteria for designation as a suspect or quasi-suspect class.... [L]egislation that denies them benefits accorded other children should be subject to exacting judicial scrutiny."[97] In particular, he defines four factors that courts use to define a suspect class: whether the class's characteristics could ever be a valid state interest; whether a history of intentional discrimination is present; the class's ability to have political clout; and whether the defining characteristic is immutable.[98] Taking the characteristic of a parent's religious preference through these steps, Dwyer concludes that strict scrutiny is an appropriate lens through which to evaluate children's issues. The first three he views as somewhat self-explanatory, for "like race, the religion of one's parents bears no inherent relation to one's native ability to benefit"[99] from society, while children are clearly unable to change their parents' religion (immutability) nor have any sway politically. Meanwhile, although children do not face "hostility

93. Dwyer I, *supra* note 55, at 1373.
94. *Id*.
95. *Id.* at 1389.
96. Dwyer II, *supra* note 87, at 1372.
97. *Id.* at 1412.
98. *Id.* at 1396.
99. *Id.* at 1397.

toward them on the part of the majority," there is demonstrated "substantial indifference" towards children in these households.[100] "Legislation that denies [some children] benefits accorded other children," he concludes, "should be subject to exacting judicial scrutiny."[101]

Professor Zaven Saroyan offers another argument for strict scrutiny analysis.[102] He looks back to the precedents of *Yoder*[103] and *Employment Division v. Smith*[104] and the development of "hybrid rights" cases. These cases, succinctly defined, concern multiple fundamental rights.[105] Saroyan concludes that "courts must consider spiritual healing challenges as hybrid cases," for they concern both the parent's religious right and the child's right to well-being.[106] Since a case of this nature typically merits strict scrutiny, he argues, a spiritual healing challenge should be treated no differently.[107] Under such a test, "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."[108]

Whether through hybrid rights or straightforward suspect class designation, the argument for strict scrutiny, and Equal Protection generally, is a compelling one. The best way to understand the argument is through analogy, and two strong illustrations are cases involving illegitimate children and incompetent adults.

1. Illegitimate Children

Long ago, children of unmarried partners were viewed with disfavor and disdain. In addition to being social outcasts, there were legal barriers in place. One such restriction was on child support: so-called "illegitimate children" were denied a judicially-enforceable guarantee of child support

100. *Id.* at 1412.

101. *Id.*

102. Zaven T. Saroyan, *Spiritual Healing and the Free Exercise Clause: An Argument for the Use of Strict Scrutiny*, 12 B.U. PUB. INT. L.J. 363 (2002).

103. *See supra* Part II.B.2.

104. Employment Division v. Smith, 494 U.S. 872 (1990) (upholding the State's right to prohibit certain drug use, such as peyote, over religious objection).

105. *Id.* at 881 ("The only decisions in which we have held that the First Amendment bars 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.").

106. Saroyan, *supra* note 102.

107. *See id.* at 382–85 (analyzing why strict scrutiny applies to hybrid rights cases).

108. *Id.* at 385.

that children born in wedlock were awarded.[109] In 1973, the Supreme Court held that this sort of discrimination was unconstitutional in the case of *Gomez v. Perez*.[110] Texas had a statute that codified old common-law precedent: "illegitimate children... have no legal right to support from their fathers."[111] Further, a father "may set up illegitimacy as a defense" as a means of avoiding payment.[112] As the child would be guaranteed monetary support but for the unmarried status of its parents, a fact conceded by the state, an equal protection challenge was taken up by the Supreme Court.[113] Looking largely to precedent guaranteeing wrongful death claims despite a finding of illegitimacy,[114] the Court made the straightforward pronouncement that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally."[115] As such, "once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother."[116]

Similarly, children born out of wedlock were for many years denied equal recovery rights in worker's compensation actions.[117] Instead of being guaranteed support, these children were relegated to an "other dependents" status and were only allowed recovery "if there are not enough surviving dependents... [as] to exhaust the maximum allowable benefits."[118] In the 1972 case of *Weber v. Aetna Casualty and Surety Company*, the constitutionality of these denials was evaluated.[119] The court applied a rational basis test, yet still overturned the statute. [120] The state has a strong interest in supporting what was termed "legitimate family relationships," yet the Court held that this interest was "not served by the statute."[121]

109. Dwyer II, *supra* note 87 at 1368.
110. Gomez v. Perez, 409 U.S. 535 (1973).
111. *Id.* at 537.
112. *Id.*
113. *Id.*
114. *See* Levy v. Louisiana, 391 U.S. 68 (1968).
115. *Gomez*, 409 U.S. at 538.
116. *Id.*; *see* Pickett v. Brown, 462 U.S. 1 (1983) (finding that a two-year statute of limitations on child support enforced against illegitimate children, yet inapplicable to children born of a marriage, is similarly unconstitutional).
117. Monopoli, *supra* note 11, at 348 n.189.
118. Weber v. Aetna Cas. & Surety Co., 406 U.S. 164, 168 (1972).
119. *Id.*
120. *Id.* at 172 ("[T]his Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose.").
121. *Id.* at 175.

The Court went on to discuss the illegitimate children's needs directly. Though tacitly condoning some societal scorn on the practice of having children outside of marriage,[122] the Court strongly stated that "visiting this condemnation on the head of an infant is illogical and unjust."[123] The opinion continued:

> [I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual [and] unjust [] way of deterring the parent....[124]

Reasoning that the statute addressed no legitimate state purpose, the Court found it unconstitutional.[125] Through *Weber* and *Gomez*, the Court upheld the notion that an Equal Protection violation exists when two classes of children are treated differently solely because they were born into different families.

2. Incompetent Adults

A conflict between religious beliefs and medical decisions often arises when adults are incapacitated due to an accident or other sudden event and do not leave behind a living will or other directive. The Supreme Court of New Jersey grappled with this question in 1976 while handling the matter of *In re Quinlan*.[126] Karen Quinlan collapsed and stopped breathing for upwards of a half hour;[127] she was resuscitated but could only breathe on a ventilator; her brain functions were impaired.[128] Karen was analyzed by a number of medical professionals, who ultimately determined that she was "in a chronic and persistent 'vegetative' state, having no awareness of anything or anyone around her and existing at a primitive reflex level."[129]

After consulting their priest, Karen's parents made the decision to remove Karen's ventilator and allow her to have the "natural death"

122. *Id.* at 175 ("The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage.").
123. *Id.*
124. *Id.* at 175–76.
125. *Id.*
126. 355 A.2d 647 (N.J. 1976).
127. *Id.* at 653–54.
128. *Id.* at 655.
129. *Id.*

consistent with their Catholic faith.[130] The hospital demurred, as the doctors involved were unwilling to contribute to the ending of her life.[131] Although the court found that the parents did have the right to remove Karen's ventilator,[132] it did not base this finding on the Quinlan's religious beliefs. In fact, the court held that the argument "may be considered and dealt with without extended discussion, given the acceptance of distinctions so clear and simple... as to be dispositive on their face."[133] Citing a long line of cases, the court summarily stated that "we do not recognize an independent parental right of religious freedom to support the relief requested."[134]

The lesson of *Quinlan* is that parents seeking the right to act on behalf of their children should not expect their religious beliefs to grant them unlimited liberties to act. They may gain approval in the end, but must seek it from other rationales in conjunction with – or instead of – their faith.

C. Equal Protection, Criticized

The argument for Equal Protection analysis is certainly not without its critiques. One criticism comes from Professor David Steinberg. He believes that "attacks on spiritual healing often are overbroad and insensitive to legitimate free exercise interest and parental rights."[135] The State should only intervene, in his estimation, when "serious physical harm or illness" could result from inaction – and even then, the State needs to show that medical treatment "offers a fair probability of substantially improving the child's health."[136] Directly addressing Dwyer's argument, he considers it "highly problematic and ultimately unconvincing."[137] His criticism is mostly focused on Dwyer's argument that children deserve suspect-class classification. Steinberg writes that defining the class as "children of religious objectors" and not "all spiritual healing practitioners,"

130. *Id.* at 659. The court evaluated extensively the *amicus* brief submitted by the Church and specifically limited the decision: "the 'Catholic view' of religious neutrality in the circumstances of this case is considered by the Court only in the aspect of its impact upon … Joseph Quinlan, and not as a precedent in terms of the civil law." *Id.* at 660.

131. *Id.* at 653.

132. The ventilator was, in fact, removed, but Karen still survived for nine more years, finally passing away in 1985. *See* Robert D. McFadden, *Karen Ann Quinlan, 31, Dies; Focus of '76 Right to Die Case*, N.Y. TIMES, Jun. 12, 1985, at A1.

133. *Quinlan*, 355 A.2d at 661.

134. *Quinlan*, 355 A.2d at 661–62.

135. Steinberg, *supra* note 17, at 181.

136. *Id.* at 181–82.

137. *Id.* at 203.

yet proposing a change that affects the latter, is an unfair technique.[138] Further, he feels that an Equal Protection challenge is unworkable, for it distrusts the parents, the State, and even the children themselves, instead relying upon a guardian *ad litem* or a judge to prosecute the act.[139] In all, Steinberg concludes, "Professor Dwyer's Equal Protection Clause challenge is premised on an antipathy toward spiritual healing."[140]

Dr. Dwyer took some extreme approaches that could theoretically undermine his argument. In an early article, he argued that the Constitution guarantees no inherent parental rights whatsoever.[141] Taking "a step back" from the debates, he "ask[ed] at a fundamental level what it means to say that individuals have rights as parents...."[142] Dr. Dwyer concluded, "the claim that parents should have child-rearing rights... is inconsistent with principles deeply embedded in our law and morality."[143] His critique is rooted in a theme that permeates his scholarship, the argument that "no individual is entitled to control the life of another person, free from outside interference, no matter how intimate the relationship between them...."[144]

This theme has definite merit, but his conclusion, that parents should merely be awarded the "privilege" of raising their children, "limited in its scope to actions and decisions not inconsistent with the child's temporal interests,"[145] is unorthodox at best. Such a paradigm shift, no matter where grounded, is so shocking as to possibly cast a shadow of skepticism on later theories. Yet a greater context to the article helps belie these possible criticisms. The article was penned in 1994, and appears to have been written while Professor Dwyer was in pursuit of a Ph.D.[146] In the years since, his analyses have become more refined and nuanced, easing the effect of early unorthodoxy. For example, in an article published in 2000 he again challenged spiritual treatment exemptions, but this time managed to keep high respect for the families' beliefs.[147]

138. *Id.* at 204–05.
139. *Id.* at 206.
140. *Id.* at 207.
141. Dwyer I, *supra* note 55, at 1379.
142. *Id.* at 1373.
143. *Id.*
144. *Id.*
145. *Id.* at 1374.
146. William & Mary Law School, *Faculty Biography: James Dwyer*, http://law.wm.edu/documents/directory/dwyer-648.pdf (last visited October 13, 2010).
147. *See, e.g.*, James G. Dwyer, *Spiritual Treatment Exemptions to Child Medial Neglect Laws: What We Outsiders Should Think*, 76 NOTRE DAME L. REV. 147 (2000) [hereinafter Dwyer III].

Despite these challenges, which are not without merit, an Equal Protection challenge to exemptions appears to be a valid approach. Even more than mere validity, this approach is stronger than the traditional critiques, which are couched in the Establishment Clause.

IV. TRADITIONAL CRITIQUE: THE ESTABLISHMENT CLAUSE

The loudest and most common criticisms of exemptions are grounded not in Equal Protection but instead in the Establishment Clause. Often portrayed as operating in tension with the Free Exercise Clause, the First Amendment states that "Congress shall make no law respecting an establishment of religion."[148] This phrase has been interpreted numerous ways over the years and is commonly understood through the image of a "wall of separation" between church and state.[149] Although the specific meaning of this term is an endless debate, it still serves as a baseline to which establishment questions return.

Evaluating a potential establishment violation is a difficult matter. One enduring test, despite being "much maligned by both scholars and the Justices themselves,"[150] is the so-called "*Lemon* Test" established in *Lemon v. Kurtzman*,[151] the test has a three-step analysis: "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 statue must not foster 'an excessive government entanglement with religion.'"[152]

As for the first prong, commonly called the "secular purpose" test, "any governmental accommodation directed exclusively to the benefit of religious actors poses obvious problems...."[153] Faith healing exemptions do not fail this prong, for "a statute whose purpose was to alleviate significant governmental interference with the ability of individual religious actors to

148. U.S. CONST. amend. I.

149. In *Everson v. Board of Education*, 330 U.S. 1 (1947) Justice Black wrote that:

> The "establishment of religion" clause means at least this: Neither a state nor the Federal Government may set up a church. Neither can pass laws that aid one religion, aid all religions, or prefer one religion over another . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State.

330 U.S. 1, 15–16 (1947) (quoting Reynolds v. United States, 98 U.S. 145, 164)).

150. Massie, *supra* note 89, at 748 (citations omitted).

151. Lemon v. Kurtzman, 403 U.S. 602 (1971) (forbidding public payment of teachers in private schools).

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

153. Massie, *supra* note 89, at 749.

[practice their religion] would pass muster."[154] The second prong "presents the greatest problems for accommodations aimed exclusively at religious actors."[155] Since these exemptions "obviously provide a benefit to religious actors that is unavailable to others," a close look must be taken.[156] Just like every Establishment question, there is a gray area, as a line of cases indicates that "when government policy itself has imposed a burden on religiously motivated behavior" it may overrule establishment concerns.[157] The final *Lemon* prong is concerned with "entanglement," and "invalidates policies requiring a high degree of interaction between government and religious institutions or actors."[158] When a statute seems to single out one particular sect or religion for benefits, such as recognizing that group with specific and particular language, an entanglement issue may arise.[159] As such, "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.'"[160]

The U.S. Supreme Court has not addressed whether or not neglect exemptions for religious purposes violate the Establishment Clause. In order to analyze the question outside of academia, it is necessary to look to the state courts for precedent and guidance. In 1984, Ohio's Court of Common Pleas took up a challenge to an exemption brought as a result of young Seth Miskimens' death.[161] Fascinatingly, the state itself argued for the statute's *un*constitutionality, leaving the Christian Science church as the only party to support the statute.[162] The court evaluated the statute using *Lemon* and *Prince*, and agreed with the state, finding unconstitutionality under *Lemon*'s third prong of entanglement: " [the statute] hopelessly involves the state in the determination of questions which should not be the subject of governmental inquisition...."[163] The state should not, the court confirmed, be in the business of determining what is or what is not valid belief, for this is the very definition of entanglement under *Lemon*.[164]

154. *Id.*
155. *Id.* at 749.
156. *Id.*
157. *Id.* at 750–51; *see, e.g.,* Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) (granting a religiously-based exemption to gender-based anti-discrimination statutes).
158. *Id. at* 752.
159. *Id.* at 753.
160. *Id.* at 754.
161. State v. Miskimens, 490 N.E.2d 931, 931 (Ohio Com.Pl. 1984).
162. *Id*. at 932; *see also* Monopoli, *supra* note 11, at 346 n.170.
163. *Miskimens*, 490 N.E.2d at 934.
164. *Id*.

Miskimens was endorsed by the Supreme Court of Delaware in the 1991 case of *Newmark v. Williams*.[165] In a lengthy footnote, the court gave approval to the *Miskimens* decision, opining that "[t]he reasoning applied in *Miskimens*... is a firmly rooted principle of constitutional law."[166] Any decision that would "require this Court to determine, as an initial matter, whether a certain religion is worthy of official recognition" was properly classified as an entanglement issue.[167] Courts across the nation, then, are beginning to classify children's health issues that pertain to religion as involving the Establishment Clause in at least some way. However, just because a challenge is increasingly adopted does not make it necessarily the optimal approach. Instead, an approach based on Equal Protection is stronger because it does not delve into the world of judging religious beliefs and is likely to be more acceptable to the general public.

V. WHY EQUAL PROTECTION?

A. Avoiding the Complexities of First Amendment Jurisprudence.

When handling an Establishment Clause challenge, the court is required to toe the line of inquiring into the veracity of religious beliefs, a line it is forbidden to cross.[168] The Ohio court explained in *Miskimens*, "questions such as what is a 'recognized religious body,' [and] what are its tenets... run[] clearly afoul of... the 'excessive entanglement' test...."[169] Supreme Court precedent supports this ban on judging the truth of religion holding that the veracity of a belief should not be submitted to a jury or other finder of fact, even if "the religious views... seem incredible, if not preposterous, to most people."[170] An avoidance of medicine and doctors, especially when relating to children, is precisely the sort of belief that should not be evaluated by the state or a jury, out of fairness to all parties involved. After all, the parents have a right to the free expression of their religion, a right

165. Newark v. Williams, 588 A.2d 1108, 1113 n.8 (Del. 1991).

166. *Id.*

167. *Id.* at 1114 n.8.

168. *See* Callahan v. Woods, 658 F.2d 679, 685 (9th Cir. 1981) ("In applying the free exercise clause of the First Amendment, courts may not inquire into the truth, validity, or reasonableness of a claimant's religious beliefs.").

169. *Miskimens*, 490 N.E.2d at 934.

170. United States v. Ballard, 322 U.S. 78, 87 (1944).

that is not up to majority debate. Any challenge to a religious exemption necessarily entails at least some such determination – or at least the appearance of one.

An Equal Protection challenge, on the other hand, involves no such dangerous determination. Deciding the level of scrutiny is a contentious action, and endless debate can revolve around which level a court chooses. Despite this potential controversy, the decision still contains none of the major constitutional issues of religion. It avoids the proverbial "third rail" and instead focuses on the important issue of children's lives and not eliminating one group's rights at the whims of another.

B. Pragmatic Possibilities

Beyond legalistic and Constitutional concerns, public opinion does matter. Religion is one of the most deeply entrenched issues to most Americans – a recent survey found that 56% of citizens classified religion as "very important" in their lives.[171] Thus, any decision couched in these matters is bound to be criticized and analyzed endlessly. Conceivably, a decision striking down a faith healing exemption on Establishment grounds would elicit an uproar from religious minorities of all types, even those who do not avoid doctors. Mainstream religious would conceivably react similarly, out of a concern for state influence in and over religion.

An appeal to fairness and even treatment on the grounds of Equal Protection is likely to avoid many of these issues, and is likely to be more acceptable to the general public. Certainly, some reaction is to be expected. However, society has grappled with these arguments for decades, fighting to deal with racial integration and its effects. If America can handle these strong tensions, and become a stronger country as a result, then surely it can rise to the occasion of protecting children's rights.

C. Protecting Children's Welfare and Personhood

If there is any universal theme in American jurisprudence, it is arguably that those unable to help themselves are the most important and deserving of protection. After all, how can a nation whose founding document purports to "establish Justice [and] promote the general Welfare" stand idly

171. THE PEW FORUM ON RELIGION AND PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY: SUMMARY OF KEY FINDINGS 6 (2007), *available at* http://religions.pewforum.org/pdf/report2religious-landscape-study-key-findings.pdf.

by while children are allowed to suffer and die?[172] Despite the continued existence of exemptions that preclude any prosecution for child abuse or neglect, district attorneys across the nation work to prosecute for deaths under alternative statutes, such as criminal mistreatment or manslaughter. In one notable instance, largely in response to the deaths associated with the Followers of Christ Church,[173] the Oregon legislature passed a specific measure removing the affirmative defense of faith healing from its second-degree manslaughter statute.[174] These and other efforts demonstrate the state's interest in protecting children, and the persistence of religious exemptions clearly undermines this interest. The exemptions' political survival is a topic and question too broad for this paper,[175] but their constitutional viability is an entirely different matter.

The argument for protecting children's welfare by eliminating exemptions is supported by the writings of Prof. Massie. She writes:

> Given our society's concern for the welfare of children, and the statutory presumption that failure to provide them with certain necessaries [*sic*.] 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.[176]

It is a reasonable and logical argument, and under this lens the continuation of exemptions is an unjust and unconstitutional premise.

As for children's personhood, the Supreme Court is clear: "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[177] Each person has the right to decide what their personal faith shall be, arguably the shining hallmark of the First Amendment's religion clauses. However, as some commentators have argued, shouldn't a child be

172. U.S. CONST. pmbl.

173. *See supra* Part II.B.1.

174. *See* 1999 Or. Laws 954, *codified at* OR. REV. STAT. § 163.125 (1999); *see also* Laura Oppenheimer, *Parents Lose Legal Defense For Using Faith Healing; Gov. John Kitzhaber Signs A Compromise Bill That Attempts To Guarantee Children The Right To Adequate Medical Care*, THE OREGONIAN (Portland, Ore.), Aug. 17, 1999, at A1.

175. *See supra* note 13.

176. Massie, *supra* note 89, at 773.

177. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976).

able to live long enough to make the decision?[178] If not, how can his or her right be adequately expressed? Yes, children are treated differently than adults, and parents have the right to direct their upbringing. Any other conclusion undermines the possibility of a truly diverse and pluralistic society. There must, however, be limits on how much independence a family circle may have: after all, a husband may not use religion as an excuse for domestic violence, so long as the victim does not publicly object.[179] At the risk of redundancy, Professor Dwyer's words still have strong relevance and resonance: "no individual is entitled to control the life of another person, free from outside interference, no matter how intimate the relationship between them."[180]

VI. CONCLUSION

The crucial distinction to be drawn while analyzing parental rights is between *lifestyle* and *life*. Parents, churches, schools, and the community have an important role in shaping a child's lifestyle. It is precisely these influences that determine why one child plays baseball while another plays the trombone, or why one goes to a synagogue while another goes to a cathedral. These influences also determine, to a large part, whether a child goes to college or ends up in jail. But nowhere are these social and familial forces given the ability to determine whether a child has a life or not. This line is crucial. It is fundamental. And it must be protected, even at the risk of offending a parent's religious choices.

Though they may also violate the Establishment Clause, religious exemptions to child neglect statutes are an unconstitutional violation of children's right to equal protection under the law. Challenging them as such is a potentially more effective and pragmatic endeavor than an attack grounded in the First Amendment. A long line of cases has established that parents may not use religion as an excuse for neglect; the state, meanwhile, may not use the type of family a child was born into as grounds for different

178. *See, e.g.*, Jennifer Hartsell, *Mother May I…Live? Parental Refusal of Life-Sustaining Medical Treatment for Children Based on Religious Objections*, 66 TENN. L. REV. 499, 530 (1999) ("A child, given the opportunity to attain adulthood, may choose to accept or reject the religious beliefs of his or her parents. Either way, at least the child has a choice.").

179. Dwyer III, *supra* note 147, at 166–67.

180. Dwyer I, *supra* note 55, at 1373.

treatment. By removing these exemptions, children are protected while being respected as full people under the Constitution. Children are dying needlessly every year, and it is time to re-frame the debate, look through the lens of Equal Protection, and do what is right.