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Whose Body? Whose Soul? Medical Decision-Making on Behalf of Children and the Free Exercise Clause Before and After Employment Division v. Smith

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WHOSE BODY? WHOSE SOUL? MEDICAL DECISION-MAKING ON BEHALF OF CHILDREN AND THE FREE EXERCISE CLAUSE BEFORE AND AFTER *EMPLOYMENT DIVISION V. SMITH*

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ABSTRACT

Within constitutional law, children's rights have suffered from severe neglect. The issue of parents' constitutional rights to deny children medical treatment based on religious belief is one area in desperate need of attention. Although the Supreme Court's 1990 decision in Employment Division v. Smith *seemingly set forth a relatively clear rule regarding the availability of exemptions from generally applicable laws—such as those requiring parents to ensure that their children receive appropriate medical care—*Smith *has changed little in this realm, and if anything, it has only confused matters, highlighting the intractable nature of the issue. While* Smith *emphasized the police power of the state over the individual's religious motivations and revived the belief/conduct distinction, it also introduced the needlessly confusing concept of "hybrid rights," which may encompass parental rights to control their children. This brief Essay argues that the Free Exercise Clause is in fact irrelevant to the issue of parents' rights to make medical decisions for their children and that courts should begin to recognize this irrelevance. The cases involving such claims revolve almost entirely around issues that are largely unrelated to the parents' religious exercise; in addition, it is unclear that they involve the sort of governmental coercion that is required in order to state a free exercise claim. This Essay concludes by exploring the possible implications of recognizing the irrelevance of parental free exercise in medical decision-making cases.*

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INTRODUCTION

Although the Supreme Court's decision in *Employment Division v. Smith*[1] was viewed as a fundamental game-changer in the free exercise realm at the time it was decided,[2] at least one area of the law has gone virtually untouched by the purported *Smith* revolution: the free exercise right to refuse medical treatment, by or on behalf of children. Like most areas of constitutional doctrine, free exercise law has treated children with more or less massive neglect.[3] Yet, even before the Free Exercise Clause was incorporated,[4] and well before the Supreme Court's monumental free exercise decision in *Wisconsin v. Yoder*,[5] lower courts—mostly state courts—have faced the question of when, if ever, parents may refuse medical treatment to their children for religious reasons.[6] It is therefore particularly surprising that there has been very little in the way of systematic doctrinal development in this area.

1 494 U.S. 872 (1990).

2 *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990) ("The *Smith* decision is undoubtedly the most important development in the law of religious freedom in decades.").

3 Very few Supreme Court cases deal directly with minors' constitutional rights, even when minors are apparently involved in the litigation. *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992) (adjudicating an Establishment Clause challenge to prayers at high school and middle school graduations without addressing the minors' rights as distinct from those of their parents); Wisconsin v. Yoder, 406 U.S. 205, 230 (1972) (addressing a challenge to a compulsory education law for children under sixteen but noting that its holding "in no degree depends on the assertion of the religious interest of the child as contrasted with that of the parents"); Prince v. Massachusetts, 321 U.S. 158 (1944) (reviewing the conviction of an adult for having her niece sell religious literature in violation of state law, without distinguishing between the adult's rights and the child's); *see also* Anne C. Dailey, *Children's Constitutional Rights*, 95 MINN. L. REV. (forthcoming 2011) (noting that "[f]or almost two centuries, children were largely absent from the class of constitutional rights holders"). The issue of children's constitutional rights has, however, received sustained scholarly attention from some authors, including Professors Emily Buss, James Dwyer, Martha Minow, Lee Teitelbaum, and Barbara Bennett Woodhouse. *See, e.g.*, BARBARA BENNETT WOODHOUSE, HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN'S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE (2008); Emily Buss, *Constitutional Fidelity Through Children's Rights*, 2004 SUP. CT. REV. 355; Emily Buss, *Children's Associational Rights?: Why Less Is More*, 11 WM. & MARY BILL RTS. J. 1101 (2003); James G. Dwyer, *A Constitutional Birthright: The State, Parentage, and the Rights of Newborn Persons*, 56 UCLA L. REV. 755 (2009); James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845 (2003); Martha Minow, *Children's Rights: Where We've Been, and Where We're Going*, 68 TEMP. L. REV. 1573 (1995); Lee E. Teitelbaum, *Children's Rights and the Problem of Equal Respect*, 2006 UTAH L. REV. 173.

4 Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

5 406 U.S. 205 (1972).

6 *See, e.g.*, *In re* Seiferth, 127 N.E.2d 820 (N.Y. 1955); *In re* Vasko, 238 A.D. 128 (N.Y. App. Div. 1933); *In re* Hudson, 126 P.2d 765 (Wash. 1942). Because of their procedural posture, usually involving state law criminal or civil neglect or similar proceedings, the cases are most often decided in state court.

One can derive some general principles from the relatively disorderly body of case law pertaining to religious rights in the context of medical decision-making for children, of course. As explained in Part I of this Essay, at least where a child is facing a very serious medical condition requiring immediate attention, courts will not refuse to intervene. In cases in which the child's medical condition is less than life-threatening or severely debilitating, the results are more mixed. Some courts will still intervene to require medical treatment for the child, whereas others will exercise restraint, deferring to the will of the parent or child.

This Essay argues that the existence of a free exercise claim in cases involving medical treatment for children has, and in fact should have, virtually no effect on either subset of cases. Though the courts often discuss parents' free exercise rights, sometimes in conjunction with a Fourteenth Amendment parental rights claim, they rarely reason through the claim in any depth. Rather, the cases dealing with the courts' authority to order minors' medical treatment usually center around issues such as the degree of harm to the child resulting from the treatment or the lack thereof, the child's own wishes (in the case of older minors) and the reasonableness of denying care (for example, if the medical necessity of the proposed treatment is in doubt).

Part II of this Essay seeks to explain why this set of factors and results has remained relatively constant, despite the supposed paradigm shift effected by *Smith*. While *Smith* would seem to strengthen the claim of states seeking to intervene on behalf of children, it also confused matters in this realm by introducing the almost nonsensical "hybrid rights" doctrine into the mix. Ultimately, however, as I argue in Part III, the bigger problem with applying the Free Exercise Clause to the issue of refusing medical treatment by or on behalf of minors is that these cases simply should not be seen to raise free exercise concerns. Both because these cases revolve almost entirely around issues that are largely unrelated to the parents' religious exercise, and, perhaps more importantly, because it is unclear that they involve the sort of governmental coercion that is required in order to state a free exercise claim, free exercise doctrine provides an unsuitable paradigm for resolving the issues in medical decision-making cases. Unfortunately, by failing to recognize this reality, the *Smith* Court simply deepened the confusion.

After defending this view, Part III considers the implications of disassociating the Free Exercise Clause from this line of cases. While the outcomes of specific cases may not be greatly affected by such a shift, this disassociation might cause legislatures to become more hesitant to adopt exemptions to child welfare laws for faith-healing parents. In addition, it might be hoped that courts would begin to

grapple with the real, and difficult, questions that actually are implicated by this issue.

I. THE LEGAL BACKDROP BEFORE AND AFTER *SMITH*

Cases involving the right to refuse medical treatment by or on behalf of minors may arise in either a civil or a criminal posture. In the civil case, either a hospital seeks to intervene on behalf of a child to obtain a court order allowing medical treatment to go forward despite the parents' refusal to consent, sometimes supported by the child's refusal, or a children's services agency seeks an adjudication that the child is abused or neglected for the purpose of getting the court to delegate to the state agency the power to make medical decisions for the child.[7] In the criminal scenario, the state seeks to criminally prosecute parents for abuse, neglect, or manslaughter after a child has suffered harm or even died due to a lack of medical treatment.[8]

The proposition that the state has both the power and the duty to step in when children's lives are endangered is not terribly controversial, and the case law in this area largely reflects that fact.[9] Thus, at least in the civil context, courts universally hold that lifesaving medical treatment can be required notwithstanding the parents' sincere religious objections.[10] For example, in 2004, a Nevada court ordered a

[7] *See, e.g.*, *In re* D.L.E., 645 P.2d 271, 272 (Colo. 1982); Newmark v. Williams, 588 A.2d 1108, 1109 (Del. 1991); *In re* J.J., 582 N.E.2d 1138, 1139 (Ohio Ct. App. 1990). Yet another civil context in which this issue has been raised, though less commonly so, is that of a civil rights action against a hospital seeking to enjoin it from providing medical treatment against the parents' wishes to children whose religion forbids it. *See, e.g.*, Novak v. Cobb Cnty.-Kennestone Hosp. Auth., 849 F. Supp. 1559 (N.D. Ga. 1994); Jehovah's Witnesses in State of Washington v. King Cnty. Hosp., 278 F. Supp. 488 (W.D. Wash. 1967) (per curiam).

[8] *E.g.*, Commonwealth v. Nixon, 718 A.2d 311 (Pa. Super. Ct. 1998).

[9] *See, e.g.*, Hermanson v. State, 570 So.2d 322, 331-32 (Fla. Dist. Ct. App. 1990) ("The state, as *parens patriae*, has the responsibility to intervene between parent and child when there is demonstrated physical harm occurring to the child that puts a reasonable person on notice that medical intervention is necessary *for the sake of the child's life*."), *rev'd on other grounds*, 604 So. 2d 775 (1992); Morrison v. State, 252 S.W.2d 97, 100-03 (Mo. Ct. App. 1952).

[10] One possible counter-example is the case of *Newmark v. Williams*, in which the Delaware Supreme Court declined to order chemotherapy for a three-year-old child whose parents preferred faith healing. *Newmark*, 588 A.2d at 1109-10. The court based its holding partly on the parents' rights and partly on the grounds that the therapy was not in the child's best interest, given that the therapy itself was painful and risky, and that it would offer only a forty percent chance of survival. *Id.* at 1115-21. Many would argue, however, that forty percent odds are worth taking in such a case, especially given the likelihood that the child would die otherwise. Indeed, the child did die shortly after the court's decision was announced. *Id.* at 1121 n.13. Some parents have been spared prosecution after the fact when a child has died as a result of medical treatment being withheld for religious reasons. But these rulings are based on due process grounds due to the vagueness of statutory faith-healing exemptions, rather than the parents' free exercise rights. *See, e.g.*, *Hermanson*, 604 So. 2d at 782 (reversing felony child abuse and murder conviction on due process grounds). *See generally* Jennifer L. Rosato, *Putting Square Pegs in A Round Hole:*

lifesaving blood transfusion for a newborn over the parents' objections, and the Nevada Supreme Court affirmed.[11] Though the Nevada Supreme Court acknowledged that the parents' objections were based on their religious beliefs,[12] the Free Exercise Clause was never discussed. Indeed, the fact pattern and the result in that case echoed those of many cases reaching back several decades.[13]

While both the result and the reasoning may seem unsurprising in cases where a child's life is endangered by a denial of treatment, the issue of non-lifesaving treatment is perhaps more difficult. As a result, the cases are more mixed. Sometimes courts will order the intervention and sometimes not, and it is difficult to discern any principle that dictates which course a court will follow. For example, two early cases dealing with similar medical conditions afflicting older minors were decided in opposite ways within the same state. In *In re Sampson*, the Ulster County, New York Family Court ordered surgery, over his mother's religious objections, on a fifteen-year-old child with severe facial disfigurement.[14] The court invoked the U.S. Supreme Court's statement in *Prince v. Massachusetts* that "[t]he right to practice religion freely does not include the liberty to expose the community or the child to communicable disease or the latter to ill health or death."[15] That decision ran contrary to the earlier New York precedent of *In re Seiferth*, in which the New York Court of Appeals declined to require the lower court to order surgery on a fourteen-year-old with a cleft lip and palate, in the absence of any medical emergency.[16] Of course, factual distinctions can be made between the cases. Most notably, the *Sampson* case was decided by a lower court in an exercise of its wide discretion, whereas the earlier *Seiferth* case, decided by the state's high court, questioned only whether the lower court's exercise of discretion not to order the surgery was reasonable. Nonetheless, the inconsistency in the two approaches is notable.

By all indications, *Smith* has not assisted in regularizing the doctrinal landscape. Both *Sampson* and *Seiferth* were decided pre-*Smith* and even pre-*Yoder*, but even post-*Smith* cases exhibit the same

Procedural Due Process and the Effect of Faith Healing Exemptions on the Prosecution of Faith Healing Parents, 29 U.S.F. L. REV. 43 (1994) (discussing the due process issues associated with faith healing prosecutions).

11 *In re* Guardianship of L.S. & H.S., 87 P.3d 521, 522-23 (Nev. 2004).

12 *Id.* at 522, 526.

13 *E.g.*, Morrison, 252 S.W.2d 97; People *ex rel.* Wallace v. Labrenz, 104 N.E.2d 769 (Ill. 1952).

14 *In re* Sampson, 317 N.Y.S.2d 641 (N.Y. Fam. Ct. 1970).

15 *Id.* at 650 (quoting Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944)).

16 *In re* Seiferth, 127 N.E.2d 820, 823 (N.Y. 1955). It should be noted that, although the father's protest in *Seiferth* was based on his sincere spiritual belief in "letting 'the forces of the universe work on the body,'" it is unclear whether the court treated this as a religious belief, making no mention of any First Amendment claim. *Id.* at 822.

pattern of inconsistent results and vague doctrinal grounding. In one case that came down shortly after *Smith*, for example, the Ohio Court of Appeals for the Twelfth District ordered gonorrhea treatment for a sixteen-year-old minor, notwithstanding the religious scruples of both the mother and the child.[17] Considering both the Fourteenth Amendment parental rights claim and the First Amendment free exercise claim together, but without so much as mentioning the recent *Smith* decision, the court categorically concluded:

> The refusal of parents for religious reasons to allow medical treatment of their child is sufficient to justify a determination that the juvenile was a "dependent child" . . . . We see no reason why a similar finding may not be made where the juvenile refuses further medical treatment for religious reasons.[18]

Similarly, one month after *Smith* was decided, the Texas Court of Appeals affirmed the lower court's authorization of a blood transfusion for a sixteen-year-old Jehovah Witness minor who was facing surgery to repair a badly damaged arm, again without so much as mentioning *Smith*.[19]

Other than the total or near-total lack of attention paid to *Smith* in most of these cases dealing with parents' rights to refuse treatment for their children for religious reasons, a few other commonalities appear. First, courts commonly cite *Prince v. Massachusetts* for the proposition that "[p]arents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves,"[20] and that the state is free to step into the private realm of the family when the child's health or life is at risk.[21]

It is notable, moreover, that this pattern persists even in cases decided after *Wisconsin v. Yoder*. *Yoder* held that the Amish were entitled to an exemption under the Free Exercise Clause from a compulsory education law that required their children to attend school until age sixteen, because the Amish belief system required those children to leave conventional schooling after the eighth grade.[22] The *Yoder* case is widely understood as the high-water mark of free exercise

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17 *In re* J.J., 582 N.E.2d 1138, 1139-41 (Ohio Ct. App. 1990).

18 *Id.* at 1141.

19 O.G. v. Baum, 790 S.W.2d 839 (Tex. App. 1990).

20 *See, e.g.*, Morrison v. State, 252 S.W.2d 97, 100 (Mo. Ct. App. 1952) (citing Prince v. Massachusetts, 321 U.S. 158, 170 (1944)); *In re* Sampson, 317 N.Y.S.2d 641, 652 (N.Y. Fam. Ct. 1970) (same).

21 *See, e.g.*, *Morrison*, 252 S.W.2d at 100 (citing *Prince*, 321 U.S. at 166-67); *O.G.*, 790 S.W.2d at 841 (same).

22 Wisconsin v. Yoder, 406 U.S. 205, 229 (1972).

rights in the parenting context.[23] Yet, courts often refer to *Yoder*'s broad grant of parental rights in the same breath that they note *Prince*'s equally sweeping limitations on that right. Rarely do courts attempt to reconcile the two cases, or to make sense of *Smith*'s role with respect to the issue.[24] Indeed, reading a case such as *In re D.L.E.*,[25] in which the court rejected parents' right to deprive their minor child of treatment for epileptic seizures, one gets the impression that the result would have been the same before or after *Yoder*. The court first cites *Prince* for the proposition that the state can limit the parents' free exercise rights in order to protect a child's wellbeing; it then cites *Yoder* for essentially the same proposition.[26]

Sometimes courts consider the wishes of older minors separate and apart from those of their parents, but in doing so, they struggle to articulate the precise importance of those wishes. In *In re E.G.*, the Illinois Supreme Court held that a mature[27] seventeen-year-old minor could refuse treatment for leukemia on religious grounds, basing that decision on cases dealing with the common law and constitutional rights of mature minors but not on free exercise law.[28] Similarly, in *In re Green*, the court suggested that the law, and in particular *Yoder*, supported the parents' desire to withhold treatment for their sixteen-year-old child's scoliosis, but declined to issue a definitive decision without hearing from the child himself.[29] Upon learning that the child's wishes lined up with the parents', the court decided that surgery was not required.[30] The court in *In re J.J.*, by contrast, suggested that a sixteen-year-old minor with a sexually transmitted disease had no greater right to refuse treatment for himself than his mother would have to refuse it on his behalf.[31]

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[23] *See, e.g.*, James D. Gordon III, *Wisconsin v. Yoder and Religious Liberty*, 74 TEX. L. REV. 1237, 1237 (1996).

[24] *See, e.g.*, *In re* D.L.E., 645 P.2d 271, 275-76 (Colo. 1982); Newmark v. Williams, 588 A.2d 1108, 1115 (Del. 1991). *But see* Spiering v. Heineman, 448 F. Supp. 2d 1129, 1136-41 (D. Neb. 2006).

[25] 645 P.2d 271 (Colo. 1982).

[26] *Id.* at 275-76.

[27] The appellate court had held that E.G. was "mature" under the state's Emancipation of Mature Minors Act, 750 ILL. COMP. STAT. 30/3-2 (1985), according to which a minor over the age of sixteen "who has demonstrated the capacity to manage his own affairs may be partially or completely emancipated and granted whatever rights and responsibilities the court may specify." *In re* E.G., 515 N.E.2d 286, 290 (Ill. App. Ct. 1987), *aff'd in part, rev'd in part*, 549 N.E.2d 322 (Ill. 1989).

[28] *In re* E.G., 549 N.E.2d 322, 325-28 (Ill. 1989).

[29] *In re* Green, 292 A.2d 387, 390-93 (Pa. 1972).

[30] *In re* Green, 307 A.2d 279, 280 (Pa. 1973).

[31] *In re* J.J., 582 N.E.2d 1138, 1141 (Ohio Ct. App. 1990) ("The refusal of parents for religious reasons to allow medical treatment of their child is sufficient to justify a determination that the juvenile was a 'dependent child' within the meaning of R.C. 2151.04(C). We see no reason why a similar finding may not be made where the juvenile refuses further medical treatment for religious reasons. While it is true that an adult can refuse medical treatment on

To summarize, courts seem to be relatively consistent in ordering medical treatment over parents' religious objections in the face of serious risks to a child's life or health. Results are more mixed when the medical condition is less grave. In all cases, however, the analysis of the free exercise claim tends to be relatively perfunctory. Rarely does *Smith* play an important role. Part II explores some possible reasons behind this phenomenon, arguing that the *Smith* Court missed an opportunity to clarify the law in this area and instead introduced greater confusion to an already disordered doctrinal field.

II. WHAT *SMITH* DID NOT DO

Despite *Smith*'s landmark status and central importance in the free exercise realm, it has not played a significant role in cases dealing with parents' rights to refuse medical treatment for their children on religious grounds. Nor has it helped to clarify the analytical framework for deciding such cases. This Part attempts to explain this phenomenon, presenting several factors that explain *Smith*'s failure to influence courts in this area. Part III then argues that not just *Smith*, but the Free Exercise Clause itself, is irrelevant to parents' medical decision-making power over their children.

In some ways, one might have expected *Smith* to clarify the law in this area. *Smith*'s fairly broad holding that no religious exemptions are constitutionally required when a law is neutral and generally applicable[32] would seem clearly to foreclose any individual's claim for a religiously based exception to the requirements of medical or general neglect laws in effect in all states. Surely, such laws are neutral and generally applicable, as they do not, and unquestionably were not intended to, target religion specifically.[33] Rather, they apply to all parents and children across the board;[34] indeed, if they make any exceptions at all, they usually exempt adherents of faith-healing

religious grounds, the law does not grant a similar right to a juvenile. Thus, despite a juvenile's progressive capacity, one who is under the age of majority has not reached the age of full and legal discretion." (internal citation omitted)).

32 Emp't Div. v. Smith, 494 U.S. 872, 878-79 (1990).

33 *See generally* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535 (1990) (describing a law that targets religion and is therefore not neutral or generally applicable).

34 For example, Connecticut's neglect statute reaches "[a]ny person who, with criminal negligence, deprives another person of necessary food, clothing, shelter or proper physical care." CONN. GEN. STAT. § 53-20(a)(2) (2011). Illinois' child endangerment law states: "It is unlawful for any person to willfully cause or permit the life or health of a child under the age of 18 to be endangered or to willfully cause or permit a child to be placed in circumstances that endanger the child's life or health." 720 ILL. COMP. STAT. ANN. 5/12-21.6(a) (2010).

religions from the requirements of the law.[35] If there had ever been a claim under the pre-*Smith* regime that courts must refrain from interfering with parents' religiously-motivated decisions to refuse medical treatment for their children, at least in some circumstances,[36] there is no longer an obvious path to reaching that conclusion under *Smith*'s general rule.

In addition, *Smith* seemed to revive the belief-conduct distinction under the Free Exercise Clause, which is most commonly associated with the Court's decision in *Reynolds v. United States*,[37] but which had been thrown into question by *Wisconsin v. Yoder*.[38] Thus, in the face of the respondents' claim "that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation," the *Smith* Court insisted, "[w]e have never held that, and decline to do so now."[39] Instead, the Court maintained a distinction between pure belief and conduct, even when the conduct is religiously motivated.[40] If anything qualifies as regulable conduct rather than pure belief, of course, it would seem to be providing or denying medical care to another person. While parents are free to believe whatever they wish about the power of faith and prayer to heal their children, the child abuse and neglect laws are unquestionably aimed at conduct, not belief, and therefore demand compliance under *Reynolds* and *Smith*.[41]

Indeed, to the extent that *Smith* revived some of the reasoning of *Reynolds*, it is noteworthy that the *Reynolds* Court was particularly

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[35] *See generally* James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Observers*, 74 N.C. L. REV. 1321, 1353-54 & n.127 (1996) (noting that the neglect laws of forty-six states contain exemptions for faith healing and citing sources on faith healing exemptions).

[36] Of course, even under *Yoder*, the religious parents' rights may be overridden by the state's showing of a compelling state interest. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (noting that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion"). Where the medical treatment is needed to avoid death or serious debilitation of the child, it seems indisputable that the compelling state interest standard would be met. *Id.* at 230, 233-34. Thus, even before *Smith*, the state's power to order treatment for children was in doubt only in those cases where the medical intervention was not life-saving or otherwise immediately necessary.

[37] 98 U.S. 145, 166 (1878) ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.").

[38] 406 U.S. at 219-20 ("This case . . . does not become easier because respondents were convicted for their 'actions' in refusing to send their children to the public high school; in this context belief and action cannot be neatly confined in logic-tight compartments.").

[39] Emp't Div. v. Smith, 494 U.S. 872, 882 (1990).

[40] *Id.*

[41] At the same time, the belief-conduct distinction may be rather tenuous in certain circumstances, and there is no doubt that the spiritual and the physical intertwine in many respects under religious doctrine. In addition, some religions draw an explicit connection between the parent's religious observance and the child's health. One court noted, for example, that some Christian Scientists believe "that childhood illnesses were . . . manifestations of their parents' own spiritual infirmities." Newmark v. Williams, 588 A.2d 1108, 1109 n.2 (Del. 1991).

troubled by the prospect of protecting religiously-motivated conduct that threatened harm to others besides the religious individual. Thus, the Court in *Reynolds*, in passing on anti-polygamy laws, discussed the example of religiously-motivated human sacrifice.[42]

At the same time, however, *Smith* instituted two exceptions to the rule that neutral laws regulating conduct apply without accommodation for religious individuals, and both of those exceptions appear to cut in the opposite direction, suggesting that *Smith*'s general rule is not applicable to parents' medical decision-making on behalf of their children. First, the Court suggested that *Yoder*'s essence was preserved because it involved a so-called "hybrid" rights claim.[43] Second, it preserved the precedent of *Sherbert v. Verner*, in which the Court required the state to provide unemployment compensation to a Seventh-Day Adventist who was fired from her job for her religiously compelled refusal to work on Saturdays.[44] In asserting that *Sherbert* remained good law, the *Smith* Court explained, "where the State has in place a system of individual exemptions," as in the unemployment compensation context, "it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[45]

On their face, both of these exceptions would appear to apply when parental medical decision-making is at issue. The *Yoder* exception applies because every one of those cases involves not just free exercise but also the substantive due process right of parents to control the upbringing of their children. And indeed, this "parental right," along with the rights of free speech and free association, was singled out by the *Smith* Court.[46] To be sure, as Professor James Dwyer points out, this "hybrid rights" language has created widespread confusion and is, more importantly, logically incoherent.[47] And the Court's reference to the special treatment given to combined free exercise and parenting claims is undercut by the Court's assurance that the First Amendment

[42] *Reynolds*, 98 U.S. at 166-67 ("Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?").

[43] The Court in *Smith* used the term "hybrid" to refer to cases in which a free exercise claim was asserted along with another constitutional claim, such as a free speech or parental rights claim. *Smith*, 494 U.S. at 881-82. The Court implied that courts might recognize a right to an exemption from a generally applicable law in such cases. *Id.*

[44] Sherbert v. Verner, 374 U.S. 398, 400-02 (1963).

[45] *Smith*, 494 U.S. at 884.

[46] *Id.* at 881-82.

[47] James G. Dwyer, *The Good, the Bad, and the Ugly of* Employment Division v. Smith *for Family Law*, 32 CARDOZO L. REV. 1781, 1787 (2011) (describing the "vagueness and illogic" of the hybrid rights concept); *see also, e.g.*, Steven H. Aden & Lee J. Strang, *When A "Rule" Doesn't Rule: The Failure of the Oregon* Employment Division v. Smith *"Hybrid Rights Exception,"* 108 PENN ST. L. REV. 573, 587-602 (2003) (attributing the lack of success for hybrid rights claims in the lower courts, in part, to the "analytical difficulty in conceptualizing how hybrid claims fit into free exercise jurisprudence").

"does not require" subjecting child neglect laws to strict scrutiny.[48] Nonetheless, the fact remains that the Court embraced the factually and legally analogous *Yoder* scenario as the paradigm case in which strict scrutiny should be applied to a free exercise claim.[49]

Similarly, the *Sherbert* exception, which applies where the "context . . . len[ds] itself to individualized governmental assessment of the reasons for the relevant conduct," would at least arguably govern medical decision-making cases as well.[50] As noted above, the question of whether a religious exemption is required from otherwise-neutral laws requiring parents to provide medical care for their children often arises in contexts in which individualized assessment is available, such as when a court is asked by a hospital or agency to intervene on behalf of an individual minor. Indeed, the free exercise argument is not the only one that might be raised in such circumstances; a minor might seek to avoid treatment, for example, based on the argument that she is mature enough to refuse consent on her own, as an adult could do.[51] Thus, like the unemployment and zoning variance contexts, the context of neglect and dependency hearings lends itself to case-by-case decision-making, in which religious reasons arguably must be given equal standing with other reasons for exempting individuals from the general rule.

Thus, *Smith* understandably has had little effect on courts' approach to cases involving parents' rights to refuse medical treatment for their children on religious grounds. Although the *Smith* decision might, at first glance, appear to offer greater protection for children in this context, it contains enough language pointing in the opposite direction that it has failed to provide any meaningful guidance on the issue. Part III of this Essay suggests that *Smith*'s failure to provide guidance on this issue is indicative of the fundamental inappropriateness of treating medical decision-making cases as religious exemption cases.

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48 *Smith*, 494 U.S. at 888-89; Dwyer, *supra* note 47.

49 At first blush, the Amish parents in *Yoder* who wished to keep their children out of school after the age of fourteen may seem very different from the parents seeking to deny their children medical treatment. Yet *Yoder* clearly involved the state's ability to protect the children's physical welfare to some extent: compulsory education laws, after all, were designed in part to combat child labor, and laboring was precisely what the Amish children would be required to do when they were out of school. Moreover, the *Yoder* holding also affected the state's ability to protect children's education and social welfare, which is often at issue in cases involving the state's power to order surgery for children with somewhat debilitating, but not life-threatening, conditions. *See, e.g.*, *In re* Sampson, 317 N.Y.S.2d 641, 657 (N.Y. Fam. Ct. 1970) (seeking to protect the child's chance for a "normal, happy existence").

50 *Smith*, 494 U.S. at 884.

51 *See, e.g.*, *In re* E.G., 549 N.E.2d 322, 325 (Ill. 1989) (dealing with the claim of a minor, just six months shy of her eighteenth birthday, to refuse medical treatment for leukemia, on the grounds that she was sufficiently mature to decide to refuse lifesaving treatment based on her religious beliefs and noting that "[n]umerous exceptions are found in this jurisdiction and others which treat minors as adults under specific circumstances").

That Part explains that the framework of free exercise doctrine is simply a poor fit for these cases.

III. THE FREE EXERCISE RED HERRING

This Essay argues that, for all the sound and fury surrounding the rights of parents to make religiously-based medical decisions for their children, these cases are not about, and should not be understood to be about, the Free Exercise Clause at all. As I explain below, these cases serve neither the goal of "nondiscrimination" nor that of "substantive equality" for religious believers—the two primary values served by Free Exercise Clause doctrine. They are not properly characterized as religious exemption cases. Yet, *Smith*'s reaffirmation of *Yoder*, as well as its mixed signals with regard to the proper level of scrutiny for medical decision-making claims, has only perpetuated the error.

Some of the medical treatment cases—particularly those involving young children, non-lifesaving treatments, and religious parents—are indeed difficult. But they are not difficult because they involve religion, and it is time that courts grasped the fact that religion has no special role to play here. Instead, these cases revolve around the difficult questions of what constitutes medical necessity and how much deference various decision-makers should receive; what constitutes a "normal" life and to what extent the state is entitled to impose its concept of normality on individual children; and whether and under what circumstances children are entitled to decision-making autonomy. In other words, they consider whether the procedure is in the minor's best interests, as well as, in certain cases, whether the minor is mature enough to decide to decline care on her own. Part III.A thus defends the view that the Free Exercise Clause is simply not implicated by these medical neglect cases. Rather than further muddying the waters, the *Smith* Court could and should have taken the opportunity to clarify that parents' free exercise rights are not affected by laws requiring medical treatment for their children. Part III.B then considers what consequences, if any, might arise from viewing this issue in the way I propose.

A. *The Relative Irrelevance of Religion*

Fundamentally, it seems that the medical decision-making cases revolve around two core questions, whether a free exercise claim is raised or not. The first question is that of medical necessity and harm to the child—whether the medical intervention sought to be imposed by the state is truly needed to protect the child's health, and the degree of

harm that would result if it were denied. After all, despite the apparent tension between *Yoder* and *Smith* with respect to this issue in particular, there is virtual consensus across Supreme Court free exercise precedent that the state can intervene to protect the child's physical or mental well-being, even when the child's life is not in danger. The Court's statements in *Prince v. Massachusetts* that "[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death," and that "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare"[52] have not been undermined, and in fact have been reinforced by the subsequent cases of *Yoder*, *Smith*, and even *Parham v. J.R.*[53] The concept of "health" in *Prince*, moreover, may be broad enough to encompass the child's mental and emotional health.[54] Indeed, *Yoder*'s holding that Amish parents could keep their children out of school after the eighth grade relied heavily on the Court's finding that the children's mental and physical health would not suffer as a result; were it otherwise, the Court well may have upheld that application of the state's compulsory education law to those children.[55]

Because the language of those cases regarding the "life and health exception" to parental authority is so broad, courts' decisions must instead revolve around medical facts, such as the need for, and risks associated with, the proposed intervention. In *Newmark v. Williams*, for example, the Delaware Supreme Court mentioned *Prince*, *Yoder*, and *Pierce v. Society of Sisters*,[56] but its decision ultimately turned on "two basic inquiries," both pertaining to the best interests of the child: first, "the effectiveness of the treatment and . . . the child's chances of survival with and without the medical care," and second, "the nature of

[52] Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944).

[53] 442 U.S. 584, 603 (1979) ("Nonetheless, we have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." (citing Wisconsin v. Yoder, 406 U.S. 205, 230 (1972); *Prince*, 321 U.S. at 166)).

[54] *Prince*, 321 U.S. at 169-70 (noting the "harmful possibilities" that might arise from allowing an exception to child labor laws for street proselytizing, including "emotional excitement and psychological or physical injury").

[55] *Yoder*, 406 U.S. at 224-29 (describing the Amish upbringing as "an 'ideal' vocational education" and the benefit to Amish children from additional formal schooling as "at best . . . speculative," and concluding that any "inference" that "the Amish employment of their children on family farms is in any way deleterious to their health" would be "contrary to the record before us"); *cf.* Murphy v. Ark., 852 F.2d 1039, 1042-43 (8th Cir. 1988) (rejecting parents' argument that their children should be exempted from standardized school testing due to the parents' religious beliefs, including the argument that parents' testing at home sufficiently protected the state's interest in the quality of the children's education).

[56] 268 U.S. 510, 534-35 (1925) (holding that a state law requiring public school attendance for all children unconstitutionally "interfere[s] with the liberty of parents and guardians to direct the upbringing and education of children under their control").

the treatments and their effect on the child."[57] Indeed, as Kent Greenawalt has pointed out, "[b]y and large, the best strategy for judicial deference to parental choice about medical procedures for their children concentrates on the kind of procedure involved, not the exact grounds of parental judgment."[58]

The second fundamental question at issue in these cases is how the decision-making authority should be allocated among parent, state, and child. This is a fundamental question of family law and substantive due process—and, indeed, of political philosophy as well.[59] In suggesting that children have a "right" to a "normal" life, for example,[60] courts are inevitably imposing a vision of what constitutes "normal," and implicitly deciding that the state is entitled to determine and impose such normalcy.

The proper allocation of decision-making authority is not, however, a question that presents itself in any unique way when the Free Exercise Clause is invoked. Indeed, it is perhaps for this reason that courts often treat the parental rights claim as identical to the free exercise claim or behave as though the one claim is subsumed by the other.[61] It is unclear why the right of parents to make decisions on behalf of their children based on their own best judgment, which is protected both by the Fourteenth Amendment and the common law, should be any stronger simply because the parents' reasoning is based on their religious beliefs. The fact that a parenting claim is involved, in other words, tends to supersede rather than strengthen the free exercise claim. As Professor Dwyer argues, moreover, the parenting context is a particularly poor fit for free exercise claims, since the claim generally

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57 Newmark v. Williams, 588 A.2d 1108, 1117 (Del. 1991).

58 Kent Greenawalt, *Objections in Conscience to Medical Procedures: Does Religion Make A Difference?*, 2006 U. ILL. L. REV. 799, 810 (2006). This view is arguably in line with Marci Hamilton's assertion, moreover, that a concern with preventing harm to the child should be at the center of the free exercise decision-making in this area. MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 32, 304-05 (2005). Greenawalt continues, however, by suggesting that "in some instances the special strength of religious claims against treatment should make a difference." Greenawalt, *supra*.

59 The opinion in *Morrison v. State*, 252 S.W.2d 97 (Mo. Ct. App. 1952), strikingly illustrates the philosophical overtones to this issue. Although in that case the parents had raised a free exercise claim in seeking to refuse a blood transfusion for their newborn, the court quickly dismissed the First Amendment claim, then proceeded with a lengthy discourse on the relationship among parent, child, and state, which traversed Aristotle, Blackstone, and the Declaration of Independence, to conclude that the state had a right to intervene on behalf of the child. *Id.* at 101-03.

60 *See, e.g.*, *In re* Sampson, 317 N.Y.S.2d 641, 657 (N.Y. Fam. Ct. 1970); *cf. In re* Hudson, 126 P.2d 765, 792 (Simpson, J., dissenting).

61 *See, e.g.*, Spiering v. Heineman, 448 F. Supp. 2d 1129, 1139-40, 1142 (D. Neb. 2006) (dealing with parents' claim for an exemption from newborn metabolic disease screening and largely treating the parental rights claim in conjunction with the free exercise claim); *see also generally* Dwyer, *supra* note 47, at 1787 (describing courts' fairly universal skepticism toward hybrid rights claims involving parental rights, especially in medical treatment cases).

involves the parent's assertion of a right to affect another person in a way that is harmful to that person.[62] This is unlike other free exercise cases in which, like in *Smith* itself, the harm to others caused by the desired exemption, if any, is diffuse or difficult to identify.[63]

Purely as a descriptive matter, then, parents' free exercise claims rarely appear to carry much, if any, analytic weight in cases involving medical decision-making for minors. There may be several reasons for this. For example, such cases are largely decided by state trial courts, which must work quickly due to the time-sensitive nature of the decision-making in most instances. There is thus less time to argue and analyze any possible free exercise claims. Moreover, in theory, at least, state judges—and possibly the attorneys arguing before them, as well—are more comfortable with analyzing state statutes than with resolving questions of federal constitutional law. But more importantly, one might also perceive in those courts' relatively perfunctory treatment of free exercise precedent[64] a sense that *Smith*, its predecessors, and its progeny are not entirely germane.

As numerous commentators have explained, there are roughly two different approaches to understanding the Free Exercise Clause.[65]

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[62] Professor Dwyer's essay states:

> [T]he parenting context is less—rather than more—appropriate for religious exemptions, contrary to the tenor of *Smith*'s handling of *Yoder*. First, the right-holder claim in parenting cases is, properly viewed, quite weak, and arguably incoherent and illicit. It is at least weak, because the right holder—the parent—is not complaining about the state interfering with his or her self-determination the way Mr. Smith was and the way most people are when alleging a violation of their rights. Rather, the supposed right holder is complaining about the state interfering with his or her control of another person's life. Simply as a conceptual matter, a demand for control of another person's life must be weaker than a demand for control of one's own life, regardless of the relationship one has with the other person.

Dwyer, *supra* note 47, at 1788. In addition, he notes the problem that children will be treated unequally with respect to medical treatment, depending on whether or not their parents have religious objections to the treatment. *Id.* at 1788-89.

[63] In the unemployment compensation cases, for example, the cost of the employee's free exercise is borne by a large number of employers, rather than being concentrated in one individual.

[64] *Cf.* Walter Wadlington, *David C. Baum Memorial Lecture: Medical Decision Making for and by Children: Tensions Between Parent, State, and Child*, 1994 U. ILL. L. REV. 311, 314 & n.16 (1994) (noting "the paucity of deeply reasoned cases in the field" and suggesting that it may partly reflect "what might euphemistically be described as a low level of sensitivity to the precedential potential at the initial stages of building up a constitutional jurisprudence of family law").

[65] *See, e.g.*, Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51, 54-55 (2007) (stating that "[a] law is formally neutral if it does not use religion as a category—if religious and secular examples of the same phenomenon are treated exactly the same," whereas "[a] law is substantively neutral if it neither 'encourages [n]or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance.'" (quoting Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1990)); Christopher C. Lund, *Exploring Free Exercise Doctrine: Equal Liberty and Religious Exemptions*, 77 TENN. L. REV. 351, 353-54 (2010). Professor Laycock first introduced

Some scholars primarily view the Free Exercise Clause as serving the goal of formal neutrality, or nondiscrimination. This approach holds that the Constitution requires only that religion be treated on equal terms with nonreligion. Others see the Free Exercise Clause as vindicating a right to substantive neutrality or substantive equality. The substantive neutrality approach entails the view that true religious liberty requires that religious individuals be given the right to practice their religion, even if they are treated better in some circumstances than those who have no religious claim. In the exemptions context, this means that religious observers may be entitled to exemptions for religious reasons, even where a rule is otherwise neutral and generally applicable and admits of no equivalent secular exemptions.[66] As Christopher Lund points out, "[n]ondiscrimination approaches tend to emphasize equality while substantive approaches tend to emphasize liberty."[67] Neither approach, however, justifies or explains the purported right of parents to withhold medical treatment from their children on religious grounds.

It should be readily apparent that the value of formal neutrality or equality does not require that religious parents be given exemptions from neglect laws that do not permit parents to deny care for secular reasons. Under a formal neutrality analysis, there is no reason why the analytic process should be any different for Colin Newmark, the three-year-old boy suffering from leukemia whose parents were Christian Scientists, than for Joseph Hofbauer, a seven-year-old boy afflicted with Hodgkin's disease, whose parents chose to pursue treatment with laetrile, as recommended by their medical practitioner.[68]

At first glance, a substantive neutrality model might appear to explain the case of religious exemptions in the medical decision-making context more fully. As Professor Lund explains, "[s]mall religious minorities often want idiosyncratic things—they demand rights that no one else wants. As a result of their nonmainstream beliefs, they are often burdened by laws that burden no one else."[69] A norm of substantive neutrality would recognize that religious believers are not truly free to exercise their religion unless their unique needs are accommodated and their unique burdens alleviated. In the medical decision-making context, one might point out that most parents wish to seek conventional medical care for their children; parents belonging to faith healing sects are uniquely burdened by legal requirements that

the terms "formal neutrality" and "substantive neutrality" in his earlier article, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, *supra*.

66 *See* Lund, *supra* note 65, at 354.

67 *Id*. at 354.

68 *In re* Hofbauer, 393 N.E.2d 1009 (Ct. App. N.Y. 1979). Laetrile is a drug, briefly believed by some to be effective in treating cancer, that was never approved by the FDA.

69 Lund, *supra* note 65, at 359.

force them to seek medical care. A substantive neutrality model would seek to accommodate those parents.

As a doctrinal matter, however, it is highly questionable whether it makes sense to conceptualize the problem of religiously-based medical decision-making by parents as a problem of religious *exemptions*. Although different notions of substantive neutrality are imaginable, in the world of constitutional doctrine, the only concern is with coercive government action that impinges on believers' *liberty* to believe or to practice.[70] In the absence of such coercion, however burdened religious observers may feel by a particular state of affairs, there is no constitutionally relevant burden on the religious beliefs, and no injury to the value of substantive neutrality under the framework of the Free Exercise Clause.

When parental medical decision-making is involved, we should not be too quick to assume that coercive government action is threatening the parents' rights. The legal and regulatory backdrop here—unlike in most or all of the standard "exemption" cases—is extraordinarily amorphous. In the usual exemption case, the government regulates in a way that burdens the individual's religious practice—for example, by forbidding her to do something their religion requires, such as using a particular drug during religious worship.[71] In the absence of such a regulation that burdens religious practice, the individual would be free to do as she chooses.

By contrast, in the medical decision-making cases, where parents are seeking exemptions from generally applicable abuse or neglect laws, it is not entirely clear that parents would have the liberty to make medical decisions for their children in all circumstances, even in the absence of those laws. This is particularly evident in the case of older minors. On the one hand, the common law rule in most states is that parental consent is required for medical interventions on minors; on the other hand, statutory or common-law "mature minor" rules, combined with rules that permit minors to seek medical care without parental consent in certain sensitive areas—such as treatment for sexually transmitted diseases, prenatal care and pregnancy, and mental health service—undermine that general rule in enough cases that one may well question whether parents really possess a fundamental liberty to make medical decisions for their older children in the vast majority of cases.[72]

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[70] *See, e.g.*, Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 319-20 (1996) (describing substantive neutrality as opposing government coercion with respect to religious belief or conduct).

[71] *See* Emp't Div. v. Smith, 494 U.S. 872, 874 (1990). Of course, *Smith* began as a claim for unemployment benefits, but by the time the case reached the U.S. Supreme Court, the principal legal issue was whether a law criminalizing the use of peyote required an exemption for religious use.

[72] As an example of the patchwork of regulation in this area, New York law generally

If they do not possess any such power, it is not clear that the Free Exercise Clause, under any interpretation, can affirmatively empower them to do so by requiring courts to prevent such interventions from going forward. Instead, one might argue that no constitutional right of the parents is implicated here at all.

Moreover, and perhaps more to the point, the notion that parents have a free exercise right to deny medical treatment to their children seems to assume that there is no relevant constitutional right on the part of the child—either to decision-making autonomy, in the case of older children, or simply to protection from harm, in the case of younger children. It is not apparent that any background law—be it natural law or constitutional law—grants this power to parents over their children.[73] Indeed, some courts have held, for example, that abuse of children at the hands of a state actor violates their constitutional right to bodily integrity.[74] Arguably, it is that bodily integrity right, rather than the free exercise right of the parent, that is at stake in these cases.

The Supreme Court cases dealing with minors' rights to seek abortion without parental involvement are potentially instructive here. The Supreme Court has decided that a minor has a constitutional right to seek an abortion on her own, without parental consent, if she persuades a judge either that she is sufficiently mature and well-informed to make the decision herself, or that the abortion would be in her best interests.[75] The so-called "minor abortion cases" were decided against the same patchwork of background laws that generally grants parents the authority, under the common law, to make medical treatment decisions for their children. To the extent that some parents may seek to obstruct their child's decision to obtain an abortion, it is likely that the opposition in many, if not most, cases will be based on the parents' religious beliefs. Yet in granting a specific medical decision-making right to some minors, the Supreme Court weighed the interests of the minor, the parent, and the state, without giving any

provides that children may consent to medical care at the age of eighteen. N.Y. PUB. HEALTH LAW § 2504(1) (2010). However, minors are also considered to be capable of consenting on behalf of their own children, as well as for prenatal care, if they are married or pregnant, *id.* § 2504(2), and they are entitled to seek care without parental consent in cases of medical emergency, *id.* § 2504(4). In addition, minors may consent on their own to treatment for certain mental health, substance abuse, and sexual health services. N.Y. MENTAL HYG. LAW §§ 22.11(c), 33.21(c) (2010); N.Y. PUB. HEALTH LAW § 2305(2). Indeed, if parents can seek religious exemptions to child abuse and neglect statutes, one must question whether they may also seek exemptions to these mature minor, medical emergency, and other similar provisions.

73 *Cf. In re* Vasko, 238 A.D. 128, 131 (N.Y. App. Div. 1933) ("Children come into the world helpless, subject to all the ills to which flesh is heir. They are entitled to the benefit of all laws made for their protection—whether affecting their property, their personal rights or their persons—by the Legislature, the sovereign power of the State.").

74 *See, e.g.*, Meador v. Cabinet for Human Res., 902 F.2d 474, 476 (6th Cir. 1990) (holding that children have a substantive due process right not to be abused in a foster home).

75 *See, e.g.*, Bellotti v. Baird, 443 U.S. 622, 643-44 (1979) (plurality).

particular weight to the parents' religion or suggesting that any freestanding free exercise claim might exist.[76] Moreover, the Supreme Court has quite recently re-affirmed—or at least assumed—that minors have a constitutional right to seek an abortion without parental consent when their health would otherwise be endangered.[77] As I have argued elsewhere, it is hard to understand such a statement as anything other than a claim that minors have a substantive due process right to protect their own health.[78]

It is no surprise, then, that the Court has consistently treated the parents' religious beliefs as simply one factor among many that may be involved in their attempt to control their child's decision, rather than as the central constitutional issue.[79] Indeed, as Justice Marshall explained, "parents' right to direct their children's upbringing is a right *against* state interference with family matters";[80] it is not, however, a right to enlist the power of the state to assist in controlling the child. Depending on how one understands the background rules and obligations concerning children's rights to receive medical care, it may be the case that parents do not have any particular entitlement, even in the absence

[76] *Id.* at 633-39 (reaching its decision after acknowledging the minor's rights and interests, the "tradition of parental authority," and the "special interest of the State in encouraging an unmarried pregnant minor to seek the advice of her parents in making the important decision whether or not to bear a child"); *see also id.* at 638 (noting, without further exploring the First Amendment implications, that "affirmative sponsorship of particular ethical, religious, or political beliefs is something we expect the State *not* to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice").

[77] Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 328 (2006) (noting the state's "conce[ssion] that, under our cases, it would be unconstitutional to apply the Act in a manner that subjects minors to significant health risks").

[78] B. Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277, 330 & n.278 (2007). Again, the role of medical professionals, and the question of the appropriate degree of deference to their medical decision-making, is implicated in all of these cases. This issue is involved in both the determination of harm to the child and the allocation of decision-making authority. Courts tend to give substantial weight to the medical professional's opinion, since the specialized knowledge they possess is generally beyond the ken of most judges. Judith S. Stern & Claire V. Merkine, Brian L. v. Administration for Children's Services*: Ambivalence Toward Gender Identity Disorder as a Medical Condition*, 30 WOMEN'S RTS. L. REP. 566, 580 (2009) (discussing the "great deference" that "courts traditionally accord . . . to the expressed views of medical professionals"). At the same time, the concept of medical necessity may be extremely vague in some cases—a fact that may militate against deferring entirely to the medical professional. Is pain management during pregnancy required in order to protect a minor's health, for example? Can parents require medical treatment for children with terminal illnesses who wish to forego it and seek only palliation? Should parents, courts, or physicians have the authority to decide whether a child should receive cochlear implants, or procedures to eliminate disfiguring conditions that do not interfere with the child's physical functioning? In the absence of a clear understanding about the proper allocation of authority among parent, state, child, and medical professional, there is a danger that courts may abdicate their decision-making role.

[79] *See id.* at 637-38; H.L. v. Matheson, 450 U.S. 398, 409, 438 n.24 (1981).

[80] Hodgson v. Minnesota, 497 U.S. 417, 471 (1990) (Marshall, J., concurring in part and dissenting in part).

of state regulation, to consent to medical treatment for older minors, or even to grant or withhold consent to standard medical treatment for younger minors.

In any case, it is difficult to see why the minor abortion cases should get such radically different treatment from other medical treatment cases involving minors. Of course, the former tend to involve older minors—but most courts do not express the view that the age of the minor affects the nature or applicability of the parents' free exercise claims. In addition, the minor abortion cases have arisen in a different procedural posture than the other medical treatment cases, as the minor abortion cases were brought either by an individual minor patient or an abortion provider against a state actor, challenging the constitutionality of a state law requiring parental involvement in a minor's abortion decision. In this posture, there is no real opportunity for a parental-rights or free-exercise claim to arise directly.[81] Relatedly, unlike the other medical-treatment cases, the minor abortion cases involve a scenario in which the state is allied with the parents and seeking to support their constitutional interests; in the other medical treatment cases, the state is positioned in opposition to the parents and seeking to vindicate what it perceives to be the child's interest.

Nonetheless, the similarities are significant and potentially fruitful. This Essay argues that the minor abortion cases, in contrast to the other medical decision-making cases, take the correct approach to the issue of parents' medical decision-making on behalf of their children.[82] The Free Exercise Clause simply has no role to play here, particularly insofar as it suggests that parents who wish to deny care to their children may in some cases have a right to an "exemption" that would allow them to do so.

B. *Implications*

If it is true, as I argue here, that the Free Exercise Clause is not implicated by parents' decisions to seek or deny medical treatment for

[81] Of course, copious amicus briefs have been filed in such cases, some of which raise free exercise issues. *See* Brief of the Knights of Columbus as Amicus Curiae in Support of Appellant in No. 88-805, and Respondents-Cross-Petitioners in Nos. 88-1125 and 88-1309, Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502 (1990) (Nos. 88-805, 88-1125, 88-1309), 1989 WL 1127516 at *12-15 (discussing parental rights and free exercise rights in support of laws requiring parental notification for minors seeking abortions); Brief of Amici Curiae Catholic League for Religious & Civil Rights, the Michigan District Lutheran Church (Missouri Synod), the Michigan District, Christian Reformed Church in North America in Support of Appellants Francis X. Bellotti, et al., Bellotti v. Baird, 443 U.S. 622 (1979), 1979 WL 199887 at *11-18.

[82] *Cf.* Emily Buss, *What Does Frieda Yoder Believe*?, 2 U. PA. J. CONST. L. 53, 72-76 (1999) (arguing that the minor abortion cases can provide a model for identifying and taking into account a minors' free exercise rights).

their children for religious reasons, what consequences should follow from this view? Since courts already devote relatively little analytical energy to such claims on their own merits, it may be that the outcomes of most cases would not change if the free exercise claim were simply eliminated. The recognition that the Free Exercise Clause is not applicable to these cases might have several other implications, however.

First, numerous state legislatures have adopted exemptions to child welfare laws for faith-healing practices. Although those exemptions are more likely the result of successful lobbying by religious groups than of a belief that the Constitution requires them,[83] some legislators may have been influenced, at least in part, by a belief that the federal Free Exercise Clause requires some accommodation of religious parents in this context. If the Free Exercise Clause were seen to exert no influence in this area, however, those legislators might be more inclined to repeal their religious exemptions. Although courts might still take religious belief into consideration in evaluating mens rea when parents are criminally convicted for failure to seek medical care for their children, they would not need to consider any free exercise defense.

Moreover, the issues raised by these cases, as discussed above, are significant and in many respects unresolved. Indeed, the area of medical decision-making by and for children is sorely in need of analytic clarity. To the extent that there is a constitutional dimension to the issue, moreover, it may be with respect to children's rights to autonomy and protection—that is, with respect to their rights to bodily integrity—but that concept has received very little attention outside the context of the "minor abortion cases."[84] As it currently stands, the field of medical decision-making for minors is governed by a patchwork of rules, including not just constitutional doctrine but also mature minor laws, informed consent doctrine, common law parental rights, and various statutes that give minors the ability to consent to treatment in specific areas—such as treatment for sexually transmitted diseases, mental illnesses, and substance abuse—and withhold it in others—such as abortion.[85] Removing the free exercise red herring from the picture

[83] *See* HAMILTON, *supra* note 58, at 31. Professor Hamilton explains that several states enacted exemptions because it appeared that they were required to do so in order to receive federal funding for certain child-related services. *See also* James G. Dwyer, *supra* note 35, at 1353-63 (discussing the prevalence of religious exemptions in laws requiring medical care for children).

[84] Indeed, even those cases arguably revolve around something other than minors' rights to autonomy and bodily integrity. *See* MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 213-44 (2005) (arguing that the minor abortion cases are really about solving a public health problem—namely, teen pregnancy).

[85] *See supra* note 72 and accompanying text.

might at least encourage courts to confront some of the more pressing issues in this area head-on.

CONCLUSION

It is time for courts to recognize that the Free Exercise Clause simply has no application in cases involving parents' rights to refuse medical treatment for their minor children. The Supreme Court's decision in *Employment Division v. Smith*, rather than clarifying this point, only added to the confusion. If courts were to abandon the free exercise framework altogether in this particular domain, however, they might move toward a more productive resolution of the very thorny issues involved, such as the meaning of medical necessity and the proper allocation of decision-making authority.