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From Exemptions of Christian Science Sanatoria to Persons Who Engage in Healing by Spiritual Means: Why *Children's Healthcare v. Vladeck* Necessitates Amending the Social Security Act

Danyll Foix*

Since 1965, Social Security statutory and regulatory exemptions have allowed Medicare and Medicaid to reimburse First Church of Christ, Scientist,¹ Boston, Massachusetts sanatoria² inpatients' room, board and primary nursing expenses.³ In February of 1996, the organization Children's Healthcare Is a Legal Duty (CHILD)⁴ challenged these exemptions as violating the United

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1. Popularly known as "Christian Science" and referred to in this Comment as "the Church." Christian Science will also be referred to in this Comment as the "Christian Science religion."

2. Christian Science sanatoria provide inpatients who are members of the Church with basic physical nursing care while they receive spiritual treatment. See *infra* notes 29-49 and accompanying text.

3. See *infra* Part II (explaining how the Social Security Amendments of 1965 provided for the current Medicare and Medicaid programs' exemptions for Christian Science sanatoria).

4. See Andrew Herrmann, *Christian Science's Battle over Healing*, CHI. SUN-TIMES, Aug. 18, 1996, at 30A. Rita Swan formed CHILD after her own failed experience with practitioner healing. *Id.* Raised as a Christian Scientist, Swan married another member of the Church. *Id.* Swan had always used the help of a practitioner for healing. *Id.* In 1977, when her 16-month-old son, Matthew, became ill with meningitis, she again enlisted the services of a practitioner. *Id.* After those services proved unsuccessful, Swan "brought Matthew to the hospital emergency room on the 12th day, saying he had a broken bone (which can be set under Church practice). The doctors were appalled. They wanted to do an emergency surgery to release the pressure on the brain." *Id.*

After the doctors involved threatened to go to court, the Swans agreed to the surgery. *Id.* Their son, however, died seven days later. *Id.* The Swans brought an unsuccessful suit against the practitioner who had tried to heal their son. *Id.* These experiences led Rita Swan to form CHILD, a 300-member advocacy group dedicated to ensuring that children will not die because of parents' religious convictions. Since founding CHILD, Swan has regularly criticized the Christian Science church on television and in print media. *Id.*

States Constitution.⁵ In an unprecedented decision, the Federal District Court for the District of Minnesota Third Division ruled in *Children's Healthcare Is a Legal Duty, Inc. v. Vladeck*⁶ that Medicare and Medicaid payments to the Church's sanatoria violate the Establishment Clause of the Constitution.⁷

This Comment provides the context in which *Children's Healthcare* was decided and analyzes the court's decision from both a legal and policy perspective. Part I examines the Christian Science religion's belief in spiritual healing, the Church's system of spiritual healers and the Church's process of certifying and "listing" its system of sanatoria, practitioners and nurses. Part II summarizes both the purpose and the administration of Medicare and Medicaid, discussing their relation to Christian Science sanatoria and introducing the statutes and regulations that the *Children's Healthcare* court held to be unconstitutional. Part III examines current Establishment Clause jurisprudence and evaluates the proper standard for review of governmental accommodation of religion demonstrating that statutes that discriminate among religions require strict-scrutiny review. Part IV reviews the *Children's Healthcare* case. Part V confirms that the federal district court correctly held that the Medicare and Medicaid exemptions for Christian Scientists violate the Establishment Clause but suggests that the court's decision contravenes public policy. Part VI proposes amendments to the current Medicare and Medicaid statutes that would withstand constitutional scrutiny.

This Comment concludes that the *Children's Healthcare* court reached the correct decision. The Constitution does not allow Congress to legislate Medicare and Medicaid exemptions for only the Christian Science religion. This Comment also concludes that the Medicare and Medicaid programs' failure to accommodate any religious beliefs is unacceptable as a matter of public policy.⁸ Therefore, Congress should amend the Social Security statutes to allow competent adults whose religious beliefs compel engaging in spiritual healing to participate in the Medicare and Medicaid programs.⁹ Such religion-neutral amendments would be both consti-

5. *Children's Healthcare Is a Legal Duty, Inc. v. Vladeck*, 938 F. Supp. 1466 (D. Minn. 1996).

6. *Id.*

7. *Id.* at 1480-81.

8. See *infra* notes 291-304 and accompanying text (noting the increasing popularity of alternative therapies and suggesting that such therapies be incorporated into Medicare and Medicaid coverage).

9. See *infra* Parts V and VI (discussing the benefits of alternative medicine and proposing model amendments for effectively and fairly exempting spiritual

tutional under current Establishment Clause jurisprudence and prudent public policy because they would properly accommodate Medicare and Medicaid participants' religious beliefs.¹⁰

I. Christian Science Religion, Sanatoria, Practitioners, Nurses, Church-Certification and "Listing"

Mary Baker Eddy, founded the First Church of Christ, Scientist in the 1860s after her use of spiritual healing in her recovery from a serious fall.¹¹ The Church is based both upon the *King James Version of the Holy Bible* and Eddy's interpretation of the Bible.¹² Today, Eddy's collection of essays and letters entitled *Science and Health with Key to the Scriptures*¹³ is regarded as the basic text of the Christian Science religion.¹⁴

healing).

10. See *Christian Scientists Lose Court Battle*, STAR-TRIB. (Minneapolis), Aug. 9, 1996, at 4A. Robert Bruno, a lawyer for the plaintiffs, estimates that Christian Science practitioners collect \$8 million to \$10 million yearly in medical payments; Church spokesman Victor Westburg said a figure of \$7 million to \$7.5 million would be more accurate. *Id.* Neither of them knew how much the Church received in Medicaid money. *Id.* See also *Children's Healthcare*, 938 F. Supp. at 1486-87 (recognizing the potential impact its decision would have upon the Church and its members, the court stayed relief pending appeal). See also *infra* notes 327-365 and accompanying text (explaining how such an amendment would pass *Lemon* test scrutiny). Examined in the context of the Christian Science religion, one can understand the importance of accommodating individuals whose religion is based upon spiritual healing.

11. See ROBERT A. NENNEMAN, *THE NEW BIRTH OF CHRISTIANITY: WHY RELIGION PERSISTS IN A SCIENTIFIC AGE* 117-25 (1992).

12. See *id.* at 122. See generally MARY BAKER EDDY, *SCIENCE AND HEALTH WITH KEY TO THE SCRIPTURES* (1916) (explaining Eddy's interpretation of the Bible) (hereinafter referred to as *Science and Health*). While one may question Eddy's particular Biblical interpretation, Eddy emphasized diligently that she "set forth Christian Science and its application to the treatment of disease just as I have discovered them." *Id.* at 126:22-3. Further, Eddy claimed:

I have found nothing in ancient or in modern systems on which to found my own, except the teachings and demonstrations of our great Master and the lives of prophets and apostles. The Bible has been my only authority.

I have had no other guide in "the straight and narrow way" of Truth.

Id. at 126:26-31.

13. EDDY, *supra* note 12.

14. See NENNEMAN, *supra* note 11, at 123. Understanding that she could not personally speak with all persons curious about the Christian Science religion, Eddy realized that she would have to rely on her writings as the main source of her teaching. *Id.* From 1872 to 1874, Eddy spent most of her time writing her textbook. *Id.* She published it at her own expense in 1875. *Id.* See also STUART E. KNEE, *CHRISTIAN SCIENCE IN THE AGE OF MARY BAKER EDDY* 6 (1994) (citing a 1909 speech delivered by Augustana E. Stetson). "If people were hungry, depressed, ill or jobless . . . 'the teachings of our beloved leader, Mrs. Eddy . . . [and] our textbook, *Science and Health* will feed the multitude . . . the bread of Life.'" *Id.* (quoting AUGUSTANA STETSON, *REMINISCENCES, SERMONS AND CORRESPONDENCE PROVING ADHERENCE TO THE PRINCIPLE OF CHRISTIAN SCIENCE AS TAUGHT BY MARY BAKER EDDY* 266, 587, 623 (1913)).

According to Eddy, the Bible fails to articulate a thorough and unquestionable method of how to practice Christianity;¹⁵ nonetheless, most Christian denominations have simply improved by practicing Christianity through imitation of Jesus' lifestyle.¹⁶ *Science and Health* identifies and questions other Christian denominations selective imitation of Jesus' lifestyle.¹⁷ For Christian Scientists, the greatest deficiency evident in Christian denominations is their failure to imitate Jesus' practice of spiritual healing.¹⁸

Eddy concluded that because most Christian denominations do not rely solely upon spiritual healing they do not truly practice Christianity.¹⁹ As described in the Bible, Jesus performed many

Procedurally, the Church operates according to Eddy's *Church Manual*. See MARY BAKER EDDY, *MANUAL OF THE MOTHER CHURCH: THE FIRST CHURCH OF CHRIST SCIENTIST IN BOSTON, MASSACHUSETTS* (1895) (hereinafter referred to as *Church Manual*). This text provides the Church's constitution and bylaws. See *id.* at 25-105. See also KNEE, *supra*, at 14 (discussing the *Church Manual's* importance in "petrifying Eddy's vision of the Church"). It created a Church government which included Eddy as the leader, but also included "sophisticated, educated, balanced and elegant Trustees, directors and Board members." *Id.* at 30. Knee further described:

Although [the Church and its governing *Manual*] sounded democratic, religion by its nature isn't, nor was Christian Science. All privileges would be exercised in keeping with the precise word of Mary Eddy Baker, as laid down in the 1895 *Mother Church Manual*, which was edited on many occasions until 1910, but was not open to interpretation. Perhaps it would be more apt to call the bond between Church, leadership, founder and members a covenant and not a constitution since it spelled out the terms by which an unbreakable spiritual promise might be realized.

Id.

15. See NENNEMAN, *supra* note 11, at 140-42.

16. See *id.* Accepting Eddy's conclusion, Christian Scientists and members of other Christian denominations share the same fundamental objective: to live their lives as Jesus Christ lived his. See EDDY, *supra* note 12, at 138:17-32. Eddy accepted Jesus' familiar command to his followers: "Go ye into all the world and preach the gospel to every creature! . . . Heal the sick! . . . Love thy neighbor as thyself!" *Id.* at 138:27-30. For Eddy, Jesus' command "established in the Christian era the precedent for all Christianity, theology and healing. Christians are under as direct orders now, as they were then, to be Christ-like, to possess the Christ-spirit, to follow the Christ-example and to heal the sick as well as the sinning." *Id.* at 138:17-22. Furthermore, Eddy argued: "It is easier for Christianity to cast out sickness than sin, for the sick are more willing to part with pain than are sinners to give up the sinful, so-called pleasure senses." *Id.* at 142:6-7.

17. See *id.* at 142:7-9. While Eddy claimed many religions have ignored the spiritual healing facet of Christianity, she claimed that Christian Science must embrace all facets of Christianity. See *id.* ("We must seek the undivided garment, the whole Christ, as our proof of Christianity.").

18. See KNEE, *supra* note 14, at 10.

19. See EDDY, *supra* note 12, at 142:4-7. ("Anciently, the followers of Christ, or Truth, measured Christianity by its power over sickness, sin, and death; but modern religions generally omit all but one of these powers,—the power over sin.").

miracles—or spiritual healings—for injured or diseased persons.²⁰ Christian Scientists emphasize that Jesus never relied upon the practice of medicine or the use of medications.²¹ Thus, for Christian Scientists, the proper concept of imitating Jesus' life includes emulating Jesus' practice of spiritual healing.²²

Additionally, Christian Scientists believe that the mind is the origin of all disease and sickness.²³ The errors and sins of the human mind, therefore, produce all diseases and sicknesses.²⁴ Because disease and sickness are caused by the human mind, Christian Scientist believe that they are never really healed except by means of the Divine power.²⁵ Consequently, Christian Scientists

20. See, e.g., *Matthew* 9:2-7 (Jesus healing a paralyzed man); *Luke* 8:41-44 (Jesus healing a twelve-year-old girl); *Luke* 8:49-56 (Jesus bringing a dead child back to life).

21. See EDDY, *supra* note 12, at 143:5-8. ("[I]t is plain that God does not employ drugs or hygiene, nor provide them for human use; else Jesus would have recommended and employed them in his healing."). However, Eddy did not deny the existence of drugs which may "heal" a sick person; rather, she explained:

If drugs are part of God's creation, which He pronounced good, then drugs cannot be poisonous. If He could create drugs intrinsically bad, then they should never be used. If He creates drugs at all and designs them for medical use, why did Jesus not employ them and recommend them for the treatment of disease? . . . Narcotics quiet mortal mind, and so relieve the body; but they leave both the mind and body worse for this submission. . . . Drugs . . . are stupid substitutes for the dignity and potency of divine Mind and its efficiency to heal.

Id. at 157:16-25, 158:16-18. Furthermore, Eddy argued, spiritual healing "far outweighs drugs in the cure of disease as in the cure of sin. The more excellent way is divine Science in every case. . . . The prescription which succeeds in one instance fails in another, and this is owing to the different mental states of the patient." *Id.* at 149:3-9.

22. See *id.* at 110:25-31. Eddy wrote:

Jesus demonstrated the power of Christian Science to heal mortal minds and bodies. But this power was lost sight of, and must again be spiritually discerned, taught, and demonstrated according to Christ's command. . . . Its Science must be apprehended by as many as believe on Christ and spiritually understand Truth.

Id. See also *id.* at 136:1-5 (asserting that not only did Jesus emphasize spiritual healing, but that "Jesus established his church and maintained his mission on a spiritual foundation of Christ-healing"). "[Jesus] taught his followers that his religion had a divine Principle, which would cast out error and heal both the sick and the sinning." *Id.*

23. *Id.* at 169:18-19. Eddy supported this by writing:

You say that indigestion, fatigue, sleeplessness, cause distressed stomachs and aching heads. Then you consult your brain in order to remember what has hurt you, when your remedy lies in forgetting the whole thing; for matter has no sensation of its own, and the human mind is all that can produce pain.

Id. at 165:16-166:2.

24. *Id.* at 177:1-14.

25. *Id.* at 169:23.

rely upon spiritual healing, rather than modern medical treatments, for curing injury, disease and sickness.²⁶

Because of Christian Science's fundamental belief in spiritual healing,²⁷ Eddy anticipated a demand for spiritual healers. To accommodate the many Church members who would seek spiritual therapy,²⁸ the Church supervises a system of spiritual healers comprised of sanatoria, practitioners and nurses. When a member of the Church is seriously injured or ill, he or she may solicit the assistance of a Christian Science sanatorium.²⁹ Sanatoria provide physical nursing care to inpatients who may not be able to care for themselves³⁰ or obtain nursing care in their home,³¹ while they receive their spiritual treatment. To ensure the reliability and in-

26. In testifying before the Senate Committee on Finance, Dr. Burroughs Stokes stated that sanatoria "do not use medical methods" and that "X-rays, drugs, biologicals, laboratory analyses, etc.—are not present, because they have no part in Christian Science healing." *Social Security: Hearings on H. R. 6675 Before the Senate Comm. on Fin.*, 89th Cong. 699 (1965) [hereinafter *Hearings on H. R. 6675*] (statement of Dr. Burroughs Stokes, a Christian Science expert); see *id.* at 145:21-32. ("The theology of Christian Science includes healing the sick.").

27. See *supra* note 19-26 and accompanying text.

28. See *supra* notes 21-26 and accompanying text.

29. See *Health Services for the Aged Under the Social Security Insurance System: Hearings Before the House Comm. on Ways and Means*, 87th Cong. 727 (1961) (statement of Christian Scientist representative Dr. J. Burroughs Stokes). Dr. Burroughs Stokes testified that "when confronted with sickness or disability, a Christian Scientist turns to a Christian Science practitioner for help through prayer instead of a doctor; when in need of hospital care, a Christian Scientist goes to a Christian Science sanatorium rather than a medical hospital." *Id.* at 728.

30. See *Hearings on H.R. 6675*, *supra* note 26, at 698 (explaining the requirement that to enter a sanatorium one must be unable to care for himself or herself).

31. See S. REP. NO. 89-404, pt. 1, at 28 (1965), reprinted in 1965 U.S.C.C.A.N. 1943, 1973 (explaining that payments would be made for a patient who has to go outside of his or her home for services). Congress intended the Medicare and Medicaid exemptions for Christian Science sanatoria to extend only to inpatients who would be "bedfast patients who, except for their religion, would have to have been admitted to a hospital." *Id.* at 30. Moreover, a Christian Scientist can receive Medicare and Medicaid payments for services in a sanatorium only if his condition would require medical care provided by a hospital or similar institution but for his religious convictions. *Id.* Therefore, it is logical to conclude that sanatoria provide general physical nursing care to inpatients who require assistance that may not be available or even feasible in their home. See also *Hearings on H.R. 6675*, *supra* note 26, at 699 (statement of Dr. J. Burroughs Stokes, a Christian Science expert). Dr. Burroughs Stokes testified that:

[S]anatoriums perform services that are, to a degree, similar to those in personal care nursing homes, since their patients do not seek healing through the orthodox methods used in hospitals. The distinction between sanatoriums and personal care nursing homes is found not in the services provided, but by the physical needs of the patients. Sanatorium patients are suffering from diseases which would require hospital care if they were not Christian Scientists.

Id.

tegrity of these healers the Church utilizes a certification and listing process.³²

To become Church-certified, the institutions or persons must meet the Church's criteria.³³ Sanatoria must offer the services of at least one Church-certified practitioner and nurse.³⁴ Nearly every listed practitioner has completed Church-offered coursework in Christian Science theology.³⁵ In addition, a prospective practitioner must submit to the Church evidence that he or she has healed at least three persons by spiritual means.³⁶ Similar to li-

32. See *Hearings on H. R. 6675*, *supra* note 26, at 697 (noting that the Church "accredits a list of Christian Science practitioners and nurses and certifies Christian Science sanatoriums"); see also *infra* notes 33-49 and accompanying text.

33. See *infra* notes 42-47.

34. See *Hearings on H.R. 6675*, *supra* note 26, at 697-700 (reprinting a letter from Dr. J. Burroughs Stokes to Sen. Harry Byrd describing the Church's certification process).

35. The *Church Manual* requires the Church to maintain a Board of Education. See EDDY, *supra*, note 14, at Art. XXVIII. As such, the Board offers both Primary and Normal classes to educate Christian Science practitioners. *Id.* at Art. XXIX, Art. XXX. Participants in "Primary and Normal classes" can receive a C.S. or C.S.B. designation. *Id.* CHARLES BRADEN, *CHRISTIAN SCIENCE TODAY: POWER, POLICY, PRACTICE* 100 (1958). These designations follow nearly every listing for practitioner or nurse found in the *Christian Science Journal's* Directory. See, e.g., *Directory of Christian Science*, *CHRISTIAN SCI. J.*, Apr. 1997, at Directory (providing a supplement containing listings of Christian Science practitioners and nurses, the names of which are always followed by C.S. or C.S.B.). Clearly, undergoing the religious education needed to obtain such designations has competitive advantages. See BRADEN, *supra*, at 115 ("It is difficult to overstate the importance of getting into the Normal class.") Braden explains:

While it is perfectly possible to become a practitioner without achieving this distinction, indeed without even having had Primary class instruction, a practitioner who can write C.S.B. after his name in the *Journal* registry has a tremendous initial advantage over other practitioners. There can be no question that he is sought out more frequently than the others, especially by persons who are accustomed to commanding the services of the best.

Id.

36. See Andrew Skolnick, *Christian Scientists Claim Healing Efficacy Equal If Not Superior to That of Medicine*, 264 *JAMA* 1370, 1379 (1990). For those outside the Christian Science faith, the healing requirement remains somewhat ambiguous, in part because the treatments themselves are difficult to monitor or measure. See *id.* (explaining that "[a]ccording to the church, Christian Science treatment consists solely of 'heartfelt yet disciplined prayer'"). Practitioners administer "prayer treatment." *Id.* Thus, Christian Science practitioners only pray for cures for injured or diseased persons. *Id.* Often, in fact, practitioners do not even see their patients, but instead give them "absent treatment" by praying for them from a distance. *Id.* In addition, Eddy opposed "scientific studies to evaluate the efficacy of Christian Science healing, and even forbade the counting and disclosure of church memberships." *Id.* at 1380.

Nevertheless, the church does permit the counting of healing testimonials, of which more than 53,000 have been reported in church publications since 1900 Instead of requiring medical or other objective documentation, the church considers a healing valid if it is accompanied

censed physicians, certified Christian Science practitioners bill their patients for spiritual treatments.³⁷

Christian Science nurses' duties are more secular and include caring for bodily needs, bandaging wounds and helping patients to move about the sanatorium.³⁸ Although Christian Science nurses must also be "knowledgeable" of Church theology in order to be certified and eligible to work in Church-certified sanatoria,³⁹ nurses are required to have only sufficient "practical wisdom necessary in a sick room" as to be able to "take proper care of the sick."⁴⁰ The *Church Manual* contains no affirmative requirement that Church nurses obtain formal medical education.⁴¹

The Church oversees its system of spiritual healers by the process of certifying and listing.⁴² Once certified, institutions or

by "statements from at least three other members who either witnessed the healing that is recounted or who are able to vouch more broadly for the integrity of the testifier." Although the church claims to have roentgenograms [radiograph x rays] and other medical documentation for some of the claimed healings, it has refused to let outsiders examine the evidence.

Id.

37. Skolnick, *supra* note 36, at 1379; see *Hearings on H.R. 6675*, *supra* note 26, at 699 (explaining that some costs that would be in a hospital bill would also be in a bill from a Christian Science sanatorium, although there are some differences); see, e.g., *Medicare for the Christian Scientist* (PEACE HAVEN ASS'N & VISITING NURSE SERVS.), 1995, at 1 (identifying a listed and accredited Christian Science sanatorium located in St. Louis, Mo.). As of 1995, this sanatorium charged \$110.00 per day for the services of a Christian Science practitioner. *Id.* at 4. Additionally, out-patient practitioner services cost \$12.00 for the first half-hour and \$6.00 for each fifteen minutes thereafter. *Id.*

38. See *Hearings on H.R. 6675*, *supra* note 26, at 699 (explaining the role of Christian Science nurses).

39. See EDDY, *supra* note 14, at Art. VIII, § 31. Eddy's *Church Manual* defines "Christian Science Nurse" as:

A member of The Mother Church who represents himself or herself as a Christian Science nurse shall be one who has a demonstrable knowledge of Christian Science practice, who thoroughly understands the practical wisdom necessary in a sick room, and who can take proper care of the sick.

Id.

40. *Id.*; see also RICHARD J. BRENNEMAN, DEADLY BLESSINGS: FAITH HEALINGS ON TRIAL 118 n.78 (1990) ("Christian Science Nurse[s] . . . are graduates of Mother Church—recognized courses held at 'benevolent associations' (church parlance for nursing homes)."); cf. Amy Becker, *Blending Spiritual, Physical Health: U.S. Churches Returning Holistic Healing to Help Parishioners*, STAR TRIB. (Minneapolis), Dec. 24, 1995, available in STAR TRIB. CD-ROM (noting that Concordia College, in Moorhead, Minnesota offers a nondenominational "parish nursing course" integrating prayer with holistic health care). Since 1991 more than 250 "registered nurses" have completed this program. *Id.*

41. See EDDY, *supra* note 14, at Art. VIII, Sec. 31.

42. Cf. *Hearings on H.R. 6675*, *supra* note 26, at 697 (explaining that Christian Scientists use a list of accredited Christian Science practitioners, nurses and certified sanatoriums).

persons may be "listed."⁴³ Listing consists of placing one's advertisements in *The Christian Science Journal*.⁴⁴ As an official Church periodical,⁴⁵ the *Journal* is published partly in order to inform its members which sanatoria, practitioners or nurses are certified—in other words, which healers the Church considers to be proven, knowledgeable and reliable.⁴⁶ Currently, twenty-three Church-certified sanatoria are operating in the United States.⁴⁷

Although certifying was designed to affirm for Church members the integrity of particular Christian Science healers, Congress also incorporated this certification system into the Social Security statutes.⁴⁸ The Medicare and Medicaid statutes and regulations recognized the importance of the Church's certification system of sanatoria and, as a result, only Church-certified sanatoria were exempted from meeting all the programs' qualifications necessary to be eligible to receive Medicare and Medicaid benefits.⁴⁹

II. An Overview of the Social Security Act and the Medicare and Medicaid Programs

A. *The Purpose and Operation of the Medicare and Medicaid Programs*

Since their enactment in 1965, the Social Security Acts have tried to ensure that modern medicine and adequate medical care are available to all eligible elderly, disabled, blind and needy indi-

43. See *Hearings on H.R. 6675*, *supra* note 26, at 699. Listing of certified Christian Scientists serves two purposes. First, listing or certifying informs Christian Scientists which sanatorium, nurse, or practitioner is competent. *Id.* Second, when the Medicare and Medicaid statutes were passed in 1965, Congress incorporated the Church's certification and listing process. *Id.* at 699-707. In order to identify which Christian Science sanatoria were eligible to participate in the Medicare and Medicaid programs, Congress decided that the Church's certification and listing procedure would suffice to determine eligibility. *Id.*

44. See, e.g., *Directory of Christian Science*, *supra* note 35, at Directory (offering nearly 40 pages of listings of Christian Science practitioners, teachers and nurses).

45. See BRENNEMAN, *supra* note 40, at 46 (listing the *Christian Science Journal* among the "major publications" of the Christian Science religion).

46. See *id.*

47. See, e.g., Herrmann, *supra* note 4, at 30A; Religious News Service, *Judge: Medicare, Medicaid to Christian Scientists Unconstitutional*, ORLANDO SENTINEL, Aug. 10, 1996, at D5.

48. See *supra* note 43 (explaining generally that Congress utilized the Church's preexisting procedure of certification of sanatoria to decide which are eligible to participate in the Medicare and Medicaid programs).

49. See, e.g., 42 U.S.C. § 1395x(e)(9) (1994) (stating that the term "hospital" includes a "Christian Science sanatorium operated, or listed and certified" by the Church).

viduals.⁵⁰ This legislation is divided into three programs popularly known as Medicare Part A, Medicare Part B and Medicaid.

Medicare Part A provides an insurance program for all individuals over the age of sixty-five or who are otherwise eligible for other Social Security programs,⁵¹ enabling recipients to obtain necessary medical care.⁵² The program reimburses the expenses of medical care to institutions that provide services to eligible recipients.⁵³ The Federal Insurance Contributions Act⁵⁴ and self-employment taxes⁵⁵ finance the Medicare Part A program.⁵⁶ Thus, all individual taxpayers who earn a wage pay for Medicare Part A, regardless of whether they directly benefit from it.⁵⁷

In contrast to Part A, Medicare Part B provides a voluntary supplemental medical insurance program.⁵⁸ Individuals entitled to Part A are deemed enrolled in Part B.⁵⁹ In addition, other individuals who are at least sixty-five years old and who have been residents of the United States for at least a five years may enroll

50. See *id.* § 426; see also *id.* § 1395c (describing Medicare's purpose and the characteristics of those who are eligible); *id.* § 1396-1396(a) (describing the purpose of the Medicaid program and the characteristics of those individuals who may participate).

51. See *id.* § 426; see also *id.* § 1395c (identifying those for whom Medicare provides protection).

52. See *id.* § 1395c (entitling recipients to receive "basic protection against the costs of hospital, related post-hospital, home health services, and hospice care").

53. See *id.* § 426(c) (explaining that eligible individuals are entitled to have payments made to service providers on their behalf).

54. I.R.C. §§ 3101-3128 (1994).

55. *Id.* §§ 1401-1403.

56. The Social Security Act created the Federal Hospital Insurance Trust Fund [hereinafter Fund] into which tax revenue appropriated to finance Medicare is deposited. See 42 U.S.C. § 1395i (1994) (describing the organization, management and operation of the Fund). Sections 3101(b), 3111(b) and 1401(b) of the Internal Revenue Code impose taxes that appropriate the money deposited into the Fund. See *id.* § 1395i(a). The Federal Insurance Contributions Act taxes every individual's current income at the rate of 1.45% for Medicare. See *id.* § 3101(b)(6). In addition, the Social Security Act finances Medicare by imposing on employers an excise tax of 1.45% of employees' wages. *Id.* § 3111(b)(6). Finally, a 2.90% tax on the income of self-employed individuals funds Medicare. *Id.* § 1401(b).

57. There are a few exceptions. See *id.* §§ 1401(c), 3101(c), 3111(c) (exempting individuals from Social Security taxes to the extent that an international agreement subjects the individuals to pay income taxes for a foreign country's social security system).

58. See 42 U.S.C. § 1395j. Enrollment in Part B entitles participants to have payment made for their home health services, hospital and physician services, some clinic services, outpatient physical therapy, outpatient occupational therapy and outpatient rehabilitation facility services. *Id.* § 1395k.

59. See 42 U.S.C. § 1395p(f). Not only are Medicare Part A recipients deemed enrolled in Medicare Part B, but 42 U.S.C.A. § 1395s(a) (West Supp. 1996) provides for Part B participants' monthly premiums to be automatically deducted from their monthly social security check.

in Part B.⁶⁰ Participants' monthly premiums, coupled with contributions from federal funds, finance Medicare Part B.⁶¹ These premiums are similar to those for private health insurance, but Part B premiums are less expensive.⁶²

Both Part A and Part B of the Medicare program reimburse participants' expenses for reasonable inpatient hospital expenses, post-hospital care services and post-hospital home care expenses.⁶³ Neither Medicare program, however, covers all medical expenses that a participant may incur.⁶⁴ Medicare legislation excludes specified services and items from coverage.⁶⁵ In general, services and items which "are not reasonable and necessary for the diagnosis or treatment of illness or injury" are excluded from coverage.⁶⁶

Finally, the Medicaid program provides medical assistance for individuals "whose income and resources are insufficient to meet the costs of necessary medical services."⁶⁷ Medicaid pays for recipients' "minimal services: (1) inpatient hospital services; (2) outpatient hospital services; . . . (4) skilled nursing facility services, screening and diagnosis of children, and family planning services; and (5) physicians' services."⁶⁸ Medicaid is jointly financed by the federal income tax and state taxes.⁶⁹ Each state has substantial discretion in designing the scope and services of the

60. See 42 U.S.C. 1395o (1994) (describing the requirements of individuals eligible to enroll in the Medicare Part B supplemental insurance program).

61. See *id.* § 1395j.

62. See 42 U.S.C. § 1395r(e)(B) (listing \$42.10 as the monthly premium for individuals enrolled in Medicare Part B in 1995); see generally *id.* § 1395l (explaining the Federal Supplementary Medical Insurance Trust Fund and the rates of individuals' payments under Medicare Part B).

63. See *id.* § 1395d (listing the services that Medicare Part A covers); *id.* § 1395k (listing the services that Medicare Part B covers).

64. See 42 U.S.C. § 1395y (1994) (listing items and services not covered).

65. *Id.*

66. *Id.* § 1395y(a)(1)(A). Although "reasonable and necessary" dominates in determining the exclusion of coverage of particular medical items and services, *id.*, there are many more additional exclusions from Medicare coverage. *Id.* § 1395y(a). For example, these exclusions include: hearing aids, *id.* § 1395y(7); orthopedic shoes, *id.* § 1395y(8); treatment of flat feet, *id.* § 1395y(13)(A); routine foot care, including the trimming of nails, *id.* § 1395y(13)(C), and the "services of an assistant at surgery in a cataract operation," *id.* § 1395y(15)(A).

67. *Id.* § 1396; accord *Atkins v. Rivera*, 477 U.S. 154, 156 (1986).

68. *Roe v. Ferguson*, 515 F.2d 279, 281 (6th Cir. 1975).

69. See 42 U.S.C. §§ 1396a, 1396b(a), 1396d (explaining the Federal government's payment to states for Medicaid services provided therein); see also *Children's Healthcare Is a Legal Duty, Inc. v. Vladeck*, 938 F. Supp. 1466, 1470 (D. Minn. 1996).

Medicare program within its state,⁷⁰ provided that the state program satisfies the federal government's Medicaid standards.⁷¹

The Medicare and Medicaid statutes and regulations provide detailed definitions and qualifications for medical care institutions to participate in the programs. Only those medical care providers that meet the statutory and regulatory requirements, including the definitions of hospital,⁷² skilled nursing facility⁷³ or any other specified medical care providers, may participate.⁷⁴ Therefore, if a medical care provider fails to meet the Medicare and Medicaid programs' definitions, neither the medical care provider, nor its patients who themselves may be eligible for the programs' benefits, will be reimbursed for medical expenses.⁷⁵

B. Medicare and Medicaid Exemptions of Christian Science Sanatoria

Congress realized that Christian Science sanatoria may not satisfy all of the statutory and regulatory definitions of institutions eligible to participate in Medicare and Medicaid.⁷⁶ Church sanato-

70. See 42 U.S.C. § 1396 ("enabling each State, as far as practicable under the conditions in such State" to provide services).

71. See 42 U.S.C. § 1396(a) (providing procedural requirements that State medical assistance plans must follow). In addition, these requirements cannot violate the Constitution's prohibition on establishing religion or hindering its free exercise. In making this determination, courts must focus narrowly upon whether statutory exemptions for religion are "closely fitted" to the further of the State's compelling interests. See *Larson v. Valente*, 456 U.S. 228, 248 (1982) (determining whether an exemption is closely fitted necessitates proving that the challenged rule "is closely fitted to further the interest that it assertedly serves").

72. See *id.* § 1395x(e) (describing the requirements for an institution to be considered a "hospital" by the Medicare and Medicaid programs).

73. *Id.* § 1395i-3 (listing the requirements of "skilled nursing facilities").

74. See *id.* § 1395cc (explaining the requirements for a provider of services to be eligible for payments); see also *id.* § 1395x(m) (describing the requirements of "home health services").

75. See *id.* § 1395a. While an individual who is entitled to benefits under these programs may choose from which institution to obtain services, the institution must be "qualified to participate" in the government program. *Id.*

76. See S. REP. NO. 89-404, pt. 1, at 30 (1965), reprinted in 1965 U.S.C.C.A.N. 1943, 1971. Senate Finance Committee report explaining that the statutory exceptions for Christian Scientists would be "made for bedfast patients only who, except for their religion, would have to have been admitted to a hospital." *Id.* The report further explained that the sanatorium services, which the statute would cover, were a "substitute for, and not an addition to, medical services that might be furnished to a person if his religious beliefs were not contrary to the use of the usual facilities." *Id.* In addition, seven years later when considering the Social Security Act, the House Ways and Means Committee issued a report exempting Christian Science sanatoriums from certain Medicaid requirements:

Christian Science sanatoriums, which do not actually provide medical care, should not be required to have a skilled nursing home administrator

ria, for example, employ Church-certified practitioners and nurses rather than state-licensed doctors and nurses.⁷⁷ Therefore, Congress exempted Church-certified sanatoria from meeting the same medical care provider qualifications as other medical care institutions. The most prominent Christian Science exemptions include those in the statutes and regulations defining hospital,⁷⁸ peer review organizations and State health plans.⁷⁹

Among the many qualifications necessary to be considered a hospital⁸⁰ for the purpose of receiving Medicare and Medicaid re-

licensed by the State, to maintain an organized nursing service under the direction of a registered nurse, to maintain detailed medical records, or to have diagnostic and other service arrangements with general hospitals. The bill would therefore, exempt Christian Science sanatoriums from the requirements for a licensed nursing home administrator and other inappropriate medical requirements of the Medicaid program. Such sanatoriums will be expected to continue to meet all applicable safety standards.

H.R. REP. NO. 92-231 at 120 (1971), *reprinted in* 1972 U.S.C.C.A.N. 4989, 5106.

77. See *supra* notes 34-36 and accompanying text (explaining that Church sanatoria employ certified practitioners and nurses, and detailing the requirements of certification).

78. See 42 U.S.C. § 1395x(e) (1994); see also *infra* notes 80-85 and accompanying text (providing the statutory definition of "hospital" and identifying the specific exemption granted to Christian Science sanatoria).

79. See 42 U.S.C. § 1320c-11 (exempting Christian Science sanatoriums from the requirements relating to peer review organizations); 42 C.F.R. § 431.610(b) (1996) (exempting Christian Science sanatoria from the requirements imposed on State health plans); see also *infra* notes 90-94 and accompanying text.

80. See 42 U.S.C. § 1395x(e). The statute defines a hospital as follows:
For purposes of this subchapter—

....
The term "hospital" . . . means an institution which—

(1) is primarily engaged in providing, by or under the supervision of physicians, to inpatients (A) diagnostic services and therapeutic services for medical diagnosis, treatment, and care of injured, disabled, or sick persons, or (B) rehabilitation services for the rehabilitation of injured, disabled, or sick persons;

....
(5) provides 24-hour nursing service rendered or supervised by a registered professional nurse, and has a licensed practical nurse or registered professional nurse on duty at all times . . . ;

(6)(A) has in effect a hospital utilization review plan . . . ;

(7) in the case of an institution in any State in which State or applicable local law provides for the licensing of hospitals, (A) is licensed pursuant to such law . . . ;

....
(9) . . . The term "hospital" also includes a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts, but only with respect to items and services ordinarily furnished by such institution to inpatients, and payment may be made with respect to services provided by or in such an institution only to such extent and under such conditions, limitations, and requirements (in addition to or in lieu of the conditions, limitations, and requirements otherwise applicable) as may be provided in regulations

imbursements, the most relevant include the ability to provide medical diagnosis and treatment by or under the supervision of physicians,⁸¹ provide a twenty-four-hour nursing service supervised by a registered professional nurse⁸² and has a complete hospital utilization review plan in effect.⁸³

Despite their categorical definitions of hospital, several statutes and regulations explicitly exempt Christian Science sanatoria from meeting these definitions. For example, in one section of the Social Security Act, Congress provided that "hospital" also includes a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist.⁸⁴ In addition, the Code of Federal Regulations applicable to the Social Security Act provides that Christian Science sanatoria need not meet the regulatory definitions of hospital to qualify for the Medicare program.⁸⁵ As a result, Christian Science sanatoria need not provide the services of licensed physicians, employ licensed and registered nurses or complete hospital utilization review plans in order to receive Medicare and Medicaid reimbursements.

Analogous to the hospital exemption, Church-certified sanatoria are exempt from meeting the definitions of "skilled nursing facility,"⁸⁶ "nursing home,"⁸⁷ "intermediate care facility"⁸⁸ and

Id.

81. See *id.* 1395x(r) (defining physician as "a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the State in which he performs such function"). The Code defines dentists, podiatrists, optometrists and chiropractors in a similar manner. See *id.* These definitions include phrases similar to "legally authorized to practice medicine . . . and performs such within the scope of his license." *Id.*

82. See *id.* § 1395x(e)(5); see also *supra* note 80 (providing the text of § 1395x(e)(5)). As with the definition of "doctor" in 42 U.S.C. § 1395x(r), which requires a practitioner be "legally authorized," 42 U.S.C. § 1395x(e) defines "hospital" as including nursing services rendered or supervised by a "registered professional nurse" Compare 42 U.S.C. § 1395x(r), with 42 U.S.C. § 1395x(e).

83. See 42 U.S.C. § 1395x(e) (1994) (defining "hospital" under the statute). Hospital utilization reviews consist of a group of physicians, comprised of either physicians from the institution under review or physicians from other institutions, who inspect the hospital and the services provided to its patients. *Id.* § 1395x(e)(k). This statute ensures that hospitals use available facilities and services as sufficiently as possible. *Id.*

84. *Id.* § 1396x(e).

85. See 42 C.F.R. § 466.1 (1996) ("Hospital means a health care institution . . . as defined in Section 1861(e)-(g) of the Act [codified at 42 U.S.C. § 1395x(e)], other than a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts.").

86. See 42 U.S.C. § 1395x(y)(1); 42 C.F.R. § 466.1. Skilled nursing facilities are institutions which must provide medical care by physicians, nursing care by licensed and registered nurses, offer pharmaceutical services, complete quality assessments by peer review organizations and meet other requirements. 42 U.S.C. § 395i-3. However, Christian Science sanatoria are exempted from meeting these

other medical care providers.⁸⁹ Because of these exemptions, Church-certified sanatoria need not satisfy the numerous statu-

standards by the following provisions:

Post-hospital extended care in Christian Science skilled nursing facilities.

(1) The term "skilled nursing facility" also includes a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts, but only . . . with respect to items and services ordinarily furnished by such an institution to inpatients, and payment may be made with respect to services provided by or in such an institution only to such extent and under such conditions, limitations, and requirements (in addition to or in lieu of the conditions, limitations, and requirements otherwise applicable) as may be provided in regulations.

Id. § 1395x(y)(1). According to the Code of Federal Regulations:

Skilled nursing facility (SNF) means a health care institution or distinct part of an institution . . . that (a) is primarily engaged in providing skilled nursing care or rehabilitative services to injured, disabled, or sick persons, and (b) has an agreement to participate in Medicare or Medicaid or both, and (c) is not a Christian Science sanatorium operated or listed and certified by the First Church of Christ, Scientist, Boston, Massachusetts.

42 C.F.R. § 466.1. The regulations further provide that "[s]killed nursing facility services means those items and services defined in §§ 440.40 and 440.140 of this subchapter, but excludes those services if they are provided in Christian Science sanatoria." *Id.* § 456.251.

87. See 42 U.S.C. § 1396g(e)(1); 42 C.F.R. § 431.701. While defining a "nursing home," the statute proceeds to exempt Christian Science sanatoria:

"nursing home" means any institution or facility defined as such for licensing purposes under State law, or, if State law does not employ the term nursing home, the equivalent term or terms as determined by the Secretary, but does not include a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts.

42 U.S.C. § 1396g(e)(1). Additionally, the regulation similarly exempts Christian Science sanatoria from the definition:

"Nursing home" means any institution, facility, or distinct part of a hospital that is licensed or formally recognized as meeting nursing home standards established under State law, or that is determined under § 431.704 to be included under the requirements of this subpart. The term does not include—

(a) A Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist., Boston, Mass.

42 C.F.R. § 431.701.

88. See 42 C.F.R. § 456.351. Several regulation exempt sanatoria from the meeting the definition of intermediate care facility. "Intermediate care facility services means those items and services furnished in an intermediate care facility as defined in [42 C.F.R.] §§ 440.140 and 440.150 . . . , but excludes those services if they are provided in a Christian Science sanatoria." *Id.*; accord *id.* § 456.601 (exempting Christian Science sanatoria from the meaning of intermediate care facilities, which include institutions for the mentally retarded).

89. For the purposes of this Comment, "other medical care providers" include nursing facility services and visiting nurses services, both of which provide exemptions for Christian Science sanatoria. The Code of Federal Regulations specifically provides that "nursing facility services" include services—(1) Considered appropriate by the State and provided by a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Mass." *Id.* § 440.155(b). Additionally, the "services of Christian Science nurse" means the provides:

services provided by nurses who are listed and certified by the First

tory and regulatory definitions of these institutions to receive Medicare and Medicaid payments. Thus, Church certification of its sanatoria alone is sufficient to bring the sanatoria into compliance with Medicare and Medicaid qualification requirements.

An extensive number of statutes and regulations condition medical care providers participation in the Medicare and Medicaid programs upon their completion of quality control inspections⁹⁰ by peer review organizations⁹¹ and state health plan agencies.⁹² Both

Church of Christ, Scientist, Boston, Mass., if —

(1) The services have been requested by the recipient; and

(2) The services are provided—

(i) By or under the supervision of a Christian Science visiting nurse organization listed and certified by the First Church of Christ, Scientist, Boston, Mass.; or

(ii) As private duty services to a recipient in his own home or in a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Mass., if the recipient requires individual and continuous care beyond that available from a visiting nurse or that routinely provided by the nursing staff of the sanatorium.

(c) Services in Christian Science sanatoriums. "Services in Christian Science sanatoriums" means services provided in Christian Science sanatoriums that are operated by, or listed and certified by, the First Church of Christ, Scientist, Boston, Mass.

Id. § 440.170.

90. *See, e.g., id.* § 442.12.

Provider Agreement: General requirements.

(a) *Certification and recertification.* Except as provided in paragraph (b) of this section, a Medicaid agency may not execute a provider agreement with a facility for nursing facility services nor make Medicaid payments to a facility for those services unless the Secretary or the State survey agency has certified the facility under this part to provide those services.

(b) *Exception.* The certification requirement of paragraph (a) of this section does not apply with respect to Christian Science sanatoria operated, or listed and certified, by the First Church of Christ Scientist, Boston, Mass.

91. *See, e.g.,* 42 U.S.C. § 1320c to c-5 (1994). Medicare participants undergo review by utilization and quality control peer review organizations "composed of a substantial number of . . . licensed doctors of medicine and osteopathy." *Id.* § 1320c-1(1)(A). Peer review organizations determine whether medical services are reasonable and medically necessary, *id.* § 1320c-3(a)(1)(A), whether "the quality of such services meets professionally recognized standards of health care," *id.* § 1320c-3(1)(B); and third, whether the care provided is economically efficient, *id.* § 1320c-3(a)(1)(c).

92. *See, e.g., id.* § 1396a. This entire section of the United States Code sets forth an extensive list of requirements of "state plans," which are agencies that supervise and oversee each state's administration of its Medicaid program. 42 U.S.C. § 1396(a)(19) describes state health plans as "provid[ing] such safeguards as necessary to assure that . . . care and services will be provided, in a manner consistent with simplicity of administration." In regard to the state agency health plan inspections, statutes and regulations require "that the State health agency, or other appropriate State medical agency . . . shall be responsible for establishing and maintaining health standards for private or public institutions in which re-

programs require doctors to inspect hospitals, skilled nursing facilities and other medical care providers to ensure that they comply with Medicare and Medicaid's statutory and regulatory requirements.⁹³ Several statutes and regulations, however, exclude Church-certified institutions from completing these inspections.⁹⁴ Thus, Church-listed institutions may receive Medicare and Medicaid reimbursements without completing inspections that ensure compliance with the programs' standards.

Congress realized that Church sanatoria may not satisfy all of the statutory and regulatory requirements of institutions eligible to participate in the Medicare and Medicaid programs.⁹⁵ Nonetheless legislators desired that Christian Scientists benefit from these programs, so Congress created specific exemptions for Church-certified sanatoria.⁹⁶ While debating these exemptions, Congress must have been aware that the exemptions implicated the First Amendment of the Constitution.⁹⁷ Although Congress believed that these exemptions were constitutional, a review of the Free Exercise and Establishment Clause jurisprudence proves otherwise.

cipients of medical assistance under [Medicaid] may receive care or services." *Id.* § 1396a(a)(9)(A). Furthermore, "the State health agency, or other appropriate State medical agency, shall be responsible for establishing a plan, consistent with regulations prescribed by the Secretary [of Health and Human Services], for the review by appropriate professional health personnel of the appropriateness and quality of care and services furnished to recipients of medical assistance . . ." 42 U.S.C. § 1396a(33)(A).

93. See, e.g., *id.* § 1320c to c-10; C.F.R. § 466.70-.104 (1994).

94. For an example of peer review organization exemptions, see 42 U.S.C. § 1320c-11. "The provisions of this part [of 42 U.S.C. § 1320c, explaining the oversight committees such as peer review organization of utilization and quality of health care services,] shall not apply with respect to a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts." 42 U.S.C. § 1320c-11. As for the state health plans, 42 U.S.C. § 1396a(a) states that the "provisions of paragraphs (9)(A), (31) and (33) and of section 1396b(i)(4) of this title [all describing the required state health plan] shall not apply to a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts." Furthermore, in regard to state health plans, 42 C.F.R. § 431.610(b) provides that "[t]he requirement for establishing and maintaining standards [e.g., state health plans] does not apply with respect to Christian Science sanatoria operated, or listed and certified, by the First Church of Christ Scientist, Boston, Massachusetts."

95. See *supra* notes 31, 76 and accompanying text.

96. *Id.* In fact, the *Children's Healthcare* court noted that "careful congressional deliberations" took place when enacting exemptions for church certified sanatoria.

97. *Id.*

III. Jurisprudential Principles of Religion and the Constitution: The Establishment Clause

A. *An Introduction to the Free Exercise and Establishment Clauses*

In 1843, a South Carolina appellate judge wrote: "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasions of the civil authority."⁹⁸ Because of this dual role the Constitution's Establishment Clause⁹⁹ and Free Exercise Clause¹⁰⁰ are in-opposite: the former guaranteeing that the government remain religiously neutral, the latter requiring that the government accommodate all citizens' religious beliefs.¹⁰¹

The Free Exercise Clause secures for individuals the right to *believe* in any religion.¹⁰² However, the Free Exercise Clause does not guarantee to individuals the right to *act* upon their religious beliefs.¹⁰³ Consequently, the government may regulate, prohibit or interfere with individuals' practice of religion.¹⁰⁴

The Free Exercise Clause compels the government to accommodate religious practices when the state "conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior, and thereby violate his beliefs."¹⁰⁵ Gener-

98. *Everson v. Board of Educ. of Ewing Township*, 330 U.S. 1, 15 (1947) (quoting *Harmon v. Dreher*, *Speer's Eq.*, S.C. 87, 120 (1843)).

99. U.S. CONST. amend. I, cl. 1. "Congress shall make no law respecting an establishment of religion"

100. U.S. CONST. amend. I, cl. 2. "Congress shall make no law . . . prohibiting the free exercise of [religion]"

101. *Cf. Everson*, 330 U.S. at 15 (holding transportation of pupils to both public and private schools does not violate First Amendment).

102. *See, e.g., School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 214 (1963) (holding that public schools violated the Establishment Clause by beginning each day with readings from the Bible).

103. *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) (striking as unconstitutional a state statute that required religions to register with the local government before they may peacefully solicit funds or distribute information).

104. "Practice" in this context does not mean an individual's beliefs, but an individual's conduct or behavior. *See, e.g., People v. Life Science Church*, 450 N.Y.S.2d 644, 675 *appeal dismissed*, 461 N.Y.S.2d 803 (1983) (discussing how the illegal conduct of ministers of Life Science Church does not fall within the protection of the First Amendment).

105. *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 718-19 (1981).

ally, the government must prove a compelling interest to infringe upon individuals' freedom to exercise religious beliefs¹⁰⁶ and that the infringing statute or act of government is the least restrictive means of meeting the government's compelling interest.¹⁰⁷ However, in the context of generally available public benefits programs, the Supreme Court has held that the Free Exercise Clause compels the government only to accommodate religious practices in employment compensation laws.¹⁰⁸ The Court generally declines to apply the strict scrutiny test to generally applicable laws that do not discriminate against religion.¹⁰⁹ Congress, however, places great importance on the free exercise of religion outside of the unemployment compensation context. Accordingly, in 1993 Congress enacted the Religious Freedom Restoration Act which requires the courts to apply the strict scrutiny test to all laws that "substantially burden" religion.¹¹⁰ While the fate of this Act remains uncertain, it demonstrates Congress' intent to protect individuals' free exercise of religion.

The Establishment Clause prohibits state intervention in religions' affairs.¹¹¹ The need for the Establishment Clause, the

106. See *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

107. See *id.*; *Thomas*, 450 U.S. at 718 (1981); See also *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) ("[O]nly those interests of the highest order . . . can over balance legitimate claims to the free exercise of religion.").

108. See *Hobbie*, 480 U.S. at 146 (denying job benefits to employee who refused to work on his Sabbath violates the Free Exercise Clause); *Sherbert* 374 U.S. at 410 (denying unemployment benefits to a Seventh Day Adventist who refused to work on Saturdays is a violation of the Free Exercise Clause); see also *Smith v. Employment Div.*, 494 U.S. 872, 883 (1990) ("[A]pplying that [*Sherbert* compelling interest test] we have, on three occasions, invalidated state unemployment compensation rules . . . [w]e have never invalidated any governmental action of the basis of the *Sherbert* test except the denial of unemployment compensation.").

109. See *Smith*, 494 U.S. at 882-84; see also *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (upholding generally applicable logging regulations, after declining to apply *Sherbert* strict scrutiny test, despite the fact that the logging operations would devastate several Native American tribe's religious practices); *Bowen v. Roy*, 476 U.S. 693 (1986) (refusing to apply strict scrutiny review and then upholding a statutory scheme requiring all social security beneficiaries to have a social security number, despite the plaintiffs' claim that obtaining a social security number would violate religious beliefs).

110. 42 U.S.C. § 2000bb(1) (1994). This Act restores the "compelling interest" test utilized by the Court in *Sherbert*, 374 U.S. 398, and *Wisconsin v. Yoder*, 406 U.S. 205, but not utilized in *Smith v. Employment Div.*, 494 U.S. 872. The Act provides that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," except if the government proves that the burden "furthers a compelling governmental interest and is the least restrictive means of advancing that interest." 42 U.S.C. § 2000bb(1).

111. See *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1946).

Court has illustrated, "lies in the lessons of history."¹¹² Allowing state interference with religion "puts at grave risk" the freedom of belief and conscience.¹¹³ Thus, to ensure the bar of state intervention, the Court has adopted the position that "[n]either a State nor the Federal Government can pass laws which aid one religion, aid all religions or prefer one religion over another."¹¹⁴

Because the religion clauses are cast in absolute terms, each tending to clash with the other, the Court has long struggled to chart a neutral course between them.¹¹⁵ Thus, the flexibility required of the government in harmonizing the Establishment Clause with the Free Exercise Clause has resulted in the "wall of separation between church and state" becoming more fiction than practical fact.¹¹⁶

B. *Establishment Clause Cases and the Lemon Test*

Since 1971, the Supreme Court has analyzed most Establishment Clause challenges under the three-prong test first articulated in *Lemon v. Kurtzman*.¹¹⁷ In *Lemon*, the Court reviewed Rhode Island and Pennsylvania statutes allowing each state to reimburse religious schools for expenses they incurred teaching secular subjects.¹¹⁸ In finding the legislation unconstitutional, the

112. *Lee v. Weisman*, 505 U.S. 577, 591 (1992).

113. *Id.* at 592. The Court further stated:

The lessons of the First Amendment are as urgent in the modern world as in the 18th century when it was written. One timeless lesson is that if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people.

Id.

114. *See Everson*, 330 U.S. at 15.

115. *See Walz v. Tax Comm'n*, 397 U.S. 664, 669-70 (1969).

116. The interests of the State and religion often "overlap" as the "[s]tate codes and dictates of faith touch the same activities." *McGowan v. Maryland*, 366 U.S. 420, 461 (1960) (upholding Maryland law prohibiting the sale of specified merchandise on Sundays). Thus, not even the constitutional command of a wall of separation between church and state can avoid the "interplay" between them. *Id.* at 462. For example, the Court has long recognized that state-paid police, fire control, sewage disposal, public highways, sidewalks and transportation benefit religion, but that these benefits do not violate the Constitution. *See Everson*, 330 U.S. at 17-18.

117. 403 U.S. 602, 612-13 (1971).

118. *Id.* at 602-11. The petitioners claimed that these statutes violated the Establishment Clause. *Id.* While considering *Lemon*, the Court concluded that because the "language of the Religion Clauses . . . is at best opaque" an Establishment Clause test could only be formulated by examining the "three main evils" the Establishment Clause was created to combat. *Id.* at 612. The Court's list of evils included "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Id.* (quoting *Walz*, 397 U.S. at 668).

Lemon Court ruled that in order for a statute to survive an Establishment Clause challenge: "First, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster an excessive government entanglement with religion."¹¹⁹ Applying this test, the Court held that each state's statute failed second aspect of the *Lemon* because the statute required governmental intrusion into religious schools to ensure that the state aid supported only the expenses of secular education.¹²⁰ In addition, the statutes failed the third prong because of their potential to create political divisiveness between religion and the state.¹²¹

1. *Lemon's* First Prong

Lemon's first prong "prohibits [the] government from abandoning secular purposes in order to put an imprimatur on one religion . . . or religious organization."¹²² When determining whether a statute has a secular purpose sufficient to pass *Lemon's* first prong, the Court "is normally deferential to a [legislative] articulation of a secular purpose."¹²³ Consequently, most statutes challenged as violative of the Establishment Clause pass *Lemon's* first prong.

The Court has recognized that permissible secular and impermissible religious purposes are not exclusive.¹²⁴ Government

119. *Id.* at 612-13 (citations omitted). The three-prong *Lemon* test is in fact a "cumulative criteria developed by the Court over many years." *Id.* at 612. "*Lemon's* 'purpose' and 'effects' prongs are taken from *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963). The 'entanglement' prong is taken from *Walz v. Tax Commission*, 397 U.S. at 674, which in turn relied upon *Board of Education v. Allen*, 392 U.S. 236, 243 (1968)." M.G. "Pat" Robertson, *Squeezing Religion Out of the Public Square—The Supreme Court, Lemon, and the Myth of the Secular Society*, 4 WM. & MARY BILL RTS. J. 223, 236 (1995).

120. *Lemon*, 403 U.S. at 619-21.

121. *Id.* at 622-24.

122. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 9-10 (1989) (quoting *Gillette v. United States*, 407 U.S. 437, 450 (1971) (citing also *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 381 (1985); *Wallace v. Jaffree*, 472 U.S. 38, 52-53 (1985); *Welsh v. United States*, 398 U.S. 333, 356-57 (1970); *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968); *Abington Sch. Dist.*, 374 U.S. at 216-17; *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961); *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1946).

123. *Edwards v. Aguillard*, 482 U.S. 578, 586 (1987). See also *Mueller v. Allen*, 463 U.S. 388, 394 (1983) (stating that the Court's "reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the States' program may be discerned from the face of the statute").

124. As the *Lynch* Court noted, "only when [the Court] has concluded there was no question that the statute or [governmental] activity was motivated wholly by religious considerations," will it invalidate a statute for lacking secular purpose.

and religion may and often do overlap;¹²⁵ nonetheless, the "[g]overnment need not resign itself to ineffectual diffidence because of exaggerated fears of contagion of or by religion."¹²⁶ Governmental policies with secular purposes, it follows, may incidentally, remotely or indirectly benefit one or all religions.¹²⁷

In *Texas Monthly, Inc. v. Bullock*,¹²⁸ the Court observed that it has often upheld statutes that provide religions with governmental benefits. In these cases, however, "the benefits derived by religious organizations flowed to a large number of nonreligious groups as well."¹²⁹ If only certain religious organizations had benefited, the Court warned, "we would not have hesitated to strike them down for lacking a secular purpose and effect."¹³⁰ In sum, the Court's current standard is that a statute lacks a secular purpose, in violation of *Lemon's* first prong, if the statute only benefits particular religions or benefits all religions and does not benefit nonreligious organizations.¹³¹

Lynch v. Donnelly, 465 U.S. 668, 680 (1984) (citing *Stone v. Graham*, 449 U.S. 39, 41 (1980); *Epperson*, 393 U.S. at 107-09; *Abington Sch. Dist.*, 374 U.S. at 223-24; *Engel v. Vitale*, 370 U.S. 421, 424-25 (1962)).

125. See *supra* note 116 (recounting the Court's reoccurring example of such overlap as including churches' use of public water, sewers and utilities along with the churches' benefit of the government's provision of police and fire protection).

126. *Texas Monthly, Inc.*, 489 U.S. at 10 (citing *Mueller*, 463 U.S. 388; cf. *Walace*, 472 U.S. 38; *Lynch*, 465 U.S. 668; *Widmar v. Vincent*, 454 U.S. 263 (1981) (upholding a state university's policy of allowing all registered student organizations, including religious organizations, to use university facilities); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (allowing property tax exemption for non-profit organizations, including religious organizations)).

127. See, e.g., *Lynch*, 465 U.S. at 683 (finding the display of a crèche by a municipality "no more an advancement or endorsement of religion than . . . the exhibition of literally hundreds of religious paintings in governmentally supported museums").

128. 489 U.S. 1 (1989).

129. *Id.* at 11. The Court is referring to landmark cases such as *Walz*, 397 U.S. 664 (upholding a property tax exemption for all non-profit organizations, including religious organizations); *Widmar*, 454 U.S. 263 (sustaining a state university's practice of making available its facilities to all registered student organizations, including religious student organizations); *Mueller*, 463 U.S. 388 (upholding tax exemptions for cost of tuition, transportation and secular text books for all private schools, despite the large number of religious schools that benefited).

130. *Texas Monthly, Inc.*, 489 U.S. at 11.

131. See, e.g., *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 397-98 (1985) (striking down as unconstitutional Grand Rapids' "share time" program which provided public school teachers to teach core curriculum subjects to private school children where 40 of the 41 private schools that benefited from this program were pervasively sectarian).

2. *Lemon's Second Prong*

The Court has employed a variety of interpretations of *Lemon's* second prong which prohibits statutes that, as a primary effect, advance or inhibit religion.¹³² In several cases the Court has applied an "endorsement" or "impermissible preference" of religion interpretation.¹³³ In addition, other decisions have also emphasized the significance of whether a statute directly or indirectly benefits religion.¹³⁴

In *County of Allegheny v. ACLU*,¹³⁵ the Court examined whether Allegheny County courthouse's display of a crèche, a menorah and a Christmas tree violated the Establishment Clause.¹³⁶ The Court recognized that in interpreting *Lemon's* second prong, "[i]n recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion."¹³⁷ Relying on these precedents, the *Allegheny* Court developed a definition of governmental endorsement to include the government "conveying or attempting to convey a message that religion or a particular religious belief is *favored or preferred*"¹³⁸ or "the government act favor[s] religious belief over disbelief."¹³⁹ In addition, the Court has held that governmental "preference for particular religious beliefs constitutes an endorsement."¹⁴⁰ Finally, governmental "promotion" of a religion also equals endorsement in violation of *Lemon's* second prong.¹⁴¹ Accordingly, the *Allegheny* Court stated

132. See *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

133. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 592-94 (1989) (applying the endorsement test to the display of a menorah, crèche and Christmas tree on public property in downtown Pittsburgh); *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (applying the endorsement test to a crèche display in a park in the heart of the city).

134. See, e.g., *Hunt v. McNair*, 413 U.S. 734, 742-43 (1973) (finding that a state statute that assisted all colleges through the issuance of bonds did not have the primary effect of supporting religious colleges); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (statute that authorizes federal grants to religious and non-religious organizations who work in the area of adolescent sexual relations does not violate Establishment Clause).

135. 492 U.S. 573.

136. *Id.* at 579-87.

137. *Id.* at 592 (citing *Engel v. Vitale*, 330 U.S. 421, 436 (1962); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 17 (1989); *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 389-92 (1985); *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985)).

138. 492 U.S. at 593 (quoting *Wallace v. Jaffree*, 472 U.S. at 70).

139. *Id.* (quoting *Texas Monthly, Inc.* 489 U.S. at 27-28).

140. *Id.* (quoting *Edwards v. Aguillard*, 482 U.S. at 593).

141. See *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984); see also *Wallace v. Jaffree*, 472 U.S. at 59-60 (demonstrating that the Court sometimes employs the terms

"our present task is to determine whether [the challenged government activity] has the effect of endorsing or disapproving religious beliefs."¹⁴² The Court then held that the county's highly prominent display of the crèche both supported and endorsed "religious communication by religious organizations" in violation of the Establishment Clause.¹⁴³

While a government program that benefits religion may indicate the government's endorsement or impermissible preference of religion, it does not necessarily follow that the government's actions violate the Establishment Clause just because religion benefits. In *Zobrest v. Catalina Hills School District*,¹⁴⁴ the Court held that the Establishment Clause does not prevent a state government from furnishing sign language interpreters for all deaf students regardless of whether they attend sectarian or public schools.¹⁴⁵ The Court adamantly stated that "we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."¹⁴⁶ The Court concluded that a government program that furnishes deaf students with interpreters "distributes benefits neutrally without regard to the 'sectarian-nonsectarian' or 'public-nonpublic' nature of the school the child attends."¹⁴⁷ Despite the fact that sectarian schools benefit, the Court held, this neutrally provided government benefit "does not offend the Establishment Clause."¹⁴⁸

"endorsement," "promotion" and "favoritism" interchangeably).

142. *County of Allegheny*, 492 U.S. at 597 (1989).

143. *Id.* at 600. This case did not overrule *Lynch*, 465 U.S. 668, which had held that a city's display of a crèche did not violate the Establishment Clause. *Id.* at 672. The Court carefully distinguished *Lynch* from its holding in *Allegheny*. *County of Allegheny*, 492 U.S. at 592-602. According to the Court, the difference between *Allegheny* and *Lynch* was the context of the display of the crèche. *Id.* at 598. In *Lynch*, the city displayed a Santa Claus, elves, reindeer and other Christmas decorations along with the crèche. *Lynch*, 465 U.S. at 671. Thus the *Lynch* Court noted, the context was that of a sufficiently secular and traditional display of Christmas spirit. *Id.* at 684-85. The crèche in *Allegheny*, however, lacked such a secular context. *County of Allegheny*, 492 U.S. at 600. Because this crèche stood alone, on prominent display, it has the effect of supporting and endorsing certain religious denominations that celebrate Christmas as depicted by the crèche. *Id.* at 598-600.

144. 509 U.S. 1 (1993).

145. *Id.* at 8.

146. *Id.* at 5.

147. *Id.* at 6.

148. *Id.* See also *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Mueller v. Allen*, 463 U.S. 388 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981).

When religion does in fact receive a governmental benefit, the Court places great importance on whether religion directly or indirectly receives the benefit in determining whether the provision of this benefit violates *Lemon's* second prong. In *Bowen v. Kendrick*,¹⁴⁹ the Court applied the *Lemon* test and held that a publicly sponsored social welfare program¹⁵⁰ that benefits religious and nonreligious institutions does not have the primary effect of advancing religion.¹⁵¹ The Court identified two particularly indicative signs of the government impermissibly advancing religion: when government programs do not neutrally provide benefits without reference to religion;¹⁵² or when government aid flows directly to religiously affiliated institutions.¹⁵³

When government programs do benefit religion, the Court places weight upon the relative extent of the benefit received in considering whether the benefit advances religion. In *Hunt v.*

149. 487 U.S. 589.

150. The Court examined the Adolescent Family Life Act (AFLA), 42 U.S.C. § 300z (1982). Congress passed this statute "in response to 'several adverse health, social, and economic consequences' that often follow pregnancy and childbirth among unmarried adolescents." *Bowen*, 487 U.S. at 593 (quoting 42 U.S.C. § 300z(a)(5) (1982)). AFLA funded private and public organizations' research and promotion efforts on the harms of premarital sex and pregnancy. *Id.* at 594-95. AFLA prohibited the granting of funds to organizations that advocated, promoted or provided abortions. In addition, AFLA restricted funds from organizations that counseled or referred clients about abortion. *Id.* The petitioner claimed that this statute "on its face and as applied" violated the Establishment Clause, as its anti-abortion conditioning of funds resulted in churches receiving a large amount of public funding. *Id.* at 597-99.

151. *Id.* at 613 ("[T]he possibility of even the likelihood that some of the religious institutions who receive AFLA funding will agree with the message that Congress intended [fundamental harm of premarital sex and abortions] . . . is sufficient to warrant a finding that the statutes on its face had the primary effect of advancing religion."); *Id.* at 615 ("[W]e do not think that the absence of an express limitation on the use of federal funds for religious purposes means that the statute, on its face, has the primary effect of advocating religion.").

152. *Id.* at 607-09. When a wide variety of institutions, both sectarian and non-sectarian, are eligible to receive government funding, this evenhandedness ensures a neutral and secular effect. A number of cases support the Court's assertion. In *Mueller*, 463 U.S. 388 (upholding statute that allowed taxpayers to deduct some of the costs of their children's education), the Court emphasized that the "statute permits all parents—whether their children attend public school or private—to deduct their children's educational expenses. *Id.* at 398; see also *Widmar*, 454 U.S. at 274 ("[T]he provision of benefits to so broad a spectrum of groups is an important index of secular effect.").

153. The reason for this is that there is a risk that direct government funding, even if it is designed for specific secular purposes, may nonetheless advance the pervasively sectarian institutions' "religious mission." Accordingly, a relevant factor in deciding whether a particular statute on its face can be said to have the improper effect of advancing religion is the determination of whether, and to what extent, the statute directs government aid to pervasively sectarian institution.

Bowen, 487 U.S. at 610 (citations omitted).

McNair,¹⁵⁴ the Court employed the *Lemon* test to determine whether South Carolina's legislature's plan to assist all colleges (secular and sectarian) in financing improvements of their educational facilities by issuing revenue bonds violated the Establishment Clause.¹⁵⁵ First, while recognizing that religious colleges would receive a benefit, the Court explained that it has consistently rejected the proposition that the Establishment Clause prohibits any government act just because religiously-affiliated institutions may also receive government benefits.¹⁵⁶ Second, the Court explained that government aid has a primary effect of advancing religion in only two situations.¹⁵⁷ Because any benefits sectarian colleges may receive as a result of the issuance of the bonds would be used only for non-religious purposes, the Court held that the benefit did not have the primary effect of advancing religion.¹⁵⁸ In conclusion, unless government programs benefit only religion or directly benefit religious missions, the lone fact that religion benefits from a government program fails to invalidate that program for impermissibly advancing religion.¹⁵⁹

3. *Lemon's* Third Prong

Lemon's third prong prevents the "fusion of governmental and religious functions"¹⁶⁰ that the core rationale of the Establishment Clause prohibits. When the state "enthrones a particular sect for overt or subtle propagation of its faith,"¹⁶¹ this intrusion of

154. 413 U.S. 734 (1973).

155. *Id.*

156. *Id.* at 742-43 (citing, as examples, *Tilton v. Richardson*, 403 U.S. 672 (1971); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970); *Bradfield v. Roberts*, 175 U.S. 291 (1899)); see also *Widmar*, 454 U.S. 263 (explaining that it does not violate the Establishment Clause for a religious organization to enjoy incidental benefits from government funds).

157. *Hunt*, 413 U.S. at 743. The Court explained:

Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds specifically religious activity in an otherwise substantially secular setting.

Id.

158. *Id.* at 743-45.

159. In fact, in *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 18 (1993), the Court emphasized this point:

Given that a contrary rule would lead to such absurd results, we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.

160. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963).

161. *Lemon v. Kurtzman*, 403 U.S. 602, 634 (1971) (Douglas, J. concurring).

government into religious activities may result in an unconstitutional excessive government entanglement with religion.¹⁶² Excessive entanglement, therefore, "is an impermissible merging or intermeddling of the proper spheres of religion and government."¹⁶³

The Court has employed a variety of interpretations of excessive government entanglement, the relevant analysis being: (1) whether the statute creates "potential political divisiveness" along political and religious lines;¹⁶⁴ (2) whether the administration of the statute results in "comprehensive, discriminating and continuous state surveillance;"¹⁶⁵ and (3) whether the statute delegates or shares discretionary governmental powers with religion.¹⁶⁶

The *Lemon* Court stated that excessive entanglement may result in "political division along religious lines [which] was one of the principal evils against which the First Amendment was intended to protect."¹⁶⁷ The Court feared that excessive government entanglement would lead to citizens voting according to their religion instead of based upon the political issues.¹⁶⁸ Freedom from religious conflict is vital to our government's ability to address "an expanding array of vexing issues" in society.¹⁶⁹ The Court reviewed the constitutionality of state statutes that paid for secular expenses of both secular and sectarian schools,¹⁷⁰ and held that the potential for political fragmentation and divisiveness contravened *Lemon's* third prong because the statutes required school appropriations to be voted upon each year.¹⁷¹

162. *Id.*

163. *ACLU v. Rabun County Chamber of Commerce*, 510 F. Supp. 886, 892 (1981); see also 2 JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, in *THE WRITINGS OF JAMES MADISON* 183, 189 (G. Hunt ed., 1901) (discussing the need to keep the laws of the state from intermeddling with religion), reprinted in *Walz v. Tax Comm'n*, 397 U.S. 664, 725 (1970) (appendix II to opinion of Douglas, J., dissenting), also quoted in *Lemon*, 403 U.S. at 633-34 (Douglas, J., concurring).

164. *Lemon*, 403 U.S. at 622; see also *Americans United for Separation of Church and State v. Bubb*, 379 F. Supp. 872, 894 (1974) (considering whether a statute creates the "potential for political discordance").

165. *Lemon*, 403 U.S. at 619.

166. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 (1982).

167. *Lemon*, 403 U.S. at 622.

168. *Id.* at 623.

169. See *id.* (stating that it would "conflict[] with our whole history and tradition to permit questions of [religion] to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government").

170. *Id.* at 606.

171. *Id.* at 623-24.

In *Mueller v. Allen*,¹⁷² the Court reviewed a Minnesota statute that allowed taxpayers to deduct from their gross income their dependents' secular education supplies, tuition and transportation expenses.¹⁷³ The Court determined that when a statute results in the State getting entangled in religious affairs through a "comprehensive, discriminating, and continuing state surveillance," that state has violated the excessive entanglement prong of the *Lemon* test.¹⁷⁴ The Court determined that the state of Minnesota must distinguish between sectarian and secular educational expenses to determine the tax deduction, however, the Court did not find this be excessive entanglement in violation of *Lemon*'s third prong.¹⁷⁵

Lemon's third prong also prevents government from delegating its authority to religion. In *Larkin v. Grendel's Den*,¹⁷⁶ the Court held that a statute vesting churches and schools with the authority to deny the issuance of liquor licenses for business within a 500-foot radius of a church or school failed under *Lemon*'s third prong.¹⁷⁷ By delegating governmental powers to a religious institution, the statute unconstitutionally invited the intrusion of either the church or state into the affairs of the other.¹⁷⁸

In *Board of Education of Kiryas Joel Village School District v. Grumet*,¹⁷⁹ the Court held that a New York school district specially formed by the state legislature to accommodate a single religious denomination violated the Establishment Clause.¹⁸⁰ The Court's "fundamental source of constitutional concern" was that the religion did not receive its special school district as the result

172. 463 U.S. 388 (1983).

173. *Id.* at 390-92.

174. *Id.* at 403 (quoting *Lemon*, 403 U.S. at 619).

175. See, e.g., *Meek v. Pittenger*, 421 U.S. 349 (1975); *Sloan v. Lemon*, 413 U.S. 825 (1973), *reh'g denied*, 414 U.S. 881 (1973) (examining whether state implemented programs comply with the third prong of the *Lemon* test by refraining from excessive entanglement between religious and state powers).

176. 459 U.S. 116 (1982).

177. *Id.* at 117, 127.

178. *Id.* at 126. Regarding such delegations the *Larkin* Court noted that "few entanglements could be more offensive to the spirit of the Constitution." *Id.* at 127.

179. 512 U.S. 687 (1994).

180. *Id.* at 697. A splintered Court held that the statute creating the special school district violated the Establishment Clause because it: (1) delegated governmental authority over public schools to a religious community, *id.*, and (2) provided only a single religious denomination the benefit of a special school district, with no guarantee that other similarly situated denominations would be offered similar benefits, *id.* at 702.

of a generally applicable statute.¹⁸¹ To address this apparent lack of neutrality, the Court recently further refined the entanglement prong by emphasizing the necessity of government acts having "an 'effective means of guaranteeing' that governmental power will be and has been neutrally employed."¹⁸² This ensures that the government will not selectively legislate favoritism to any particular religion.¹⁸³

The Court has employed several interpretations of the third prong of the *Lemon* test in evaluating the effect of a statute as applied among religions.¹⁸⁴ The most prominent interpretations include government surveillance, political divisiveness, delegation of government authority and neutral application of the statute.¹⁸⁵

Although *Lemon* has been the fundamental source of Establishment Clause jurisprudence for twenty-six years, it has been often criticized. Supreme Court Justices have characterized *Lemon* as being anything from problematic to ghoulish.¹⁸⁶ Several constitutional commentators have attacked the test for a variety of reasons¹⁸⁷ and have proclaimed *Lemon's* demise.¹⁸⁸

181. *Id.* at 703.

182. *Id.* (quoting *Larkin*, 459 U.S. at 125).

183. *Id.* In addition to the constitutional problem of legislation favoring a religion, as found in *Kiryas Joel*, the Court has also held that a statute favoring religion is unconstitutional. In *Texas Monthly, Inc.*, the Court struck down a statute that exempted religious publications from paying sales taxes, while burdening similar secular publications. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 5 (1989). The Court held that because only religion-based publications benefited, the statute violated the fundamental Establishment Clause principle: neither religion nor nonreligion may be favored. *Id.*

184. See *supra* notes 164-182 and accompanying text.

185. See *supra* notes 164-167, 182 and accompanying text.

186. See, e.g., *Kiryas Joel*, 512 U.S. at 718-20, 750-52. In *Kiryas Joel*, four Justices seized the opportunity to criticize the *Lemon* test. See *id.* Justice O'Connor called *Lemon* a "bad test" because it has evolved into a "more and more amorphous and distorted" inappreciable test. *Id.* at 719-20 (O'Connor, J., concurring). O'Connor urged the Court to abandon the *Lemon* test. *Id.* Unlike Justice O'Connor, Justice Scalia criticized *Lemon* because it is difficult for courts to rely on as precedent. *Id.* at 751. Justice Scalia believed *Lemon* to be problematic, not because it is too amorphous, but because the test's flexibility creates reasoning that is "utterly meaningless, validating whatever result the Court would desire." *Id.* Justice Scalia's dissent was joined by Chief Justice Rehnquist and Justice Thomas. *Id.* at 732. In a different case, Justice Scalia described *Lemon* as "some ghoul . . . repeatedly killed and buried." *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

187. See, e.g., Keith A. Fournier, *In the Wake of Weisman: The Lemon Test Is Still a Lemon, but the Psycho-Coercion Test Is More Bitter Still*, 2 REGENT U. L. REV. 1, 10 (1992) (arguing that the *Lemon* test is not grounded in history); Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 17-19 (1978) (arguing that the test is too flexible to be applied consistently); Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*,

Nevertheless, unless the circumstances of a case call for the application of an alternative Establishment Clause test (i.e., *Larson*),¹⁸⁹ this Comment applies *Lemon*'s test for several reasons. First, the Court has never explicitly overruled *Lemon*; it remains the test under which most Establishment Clause claims are adjudicated.¹⁹⁰ Until the Supreme Court overrules *Lemon*, lower courts must and do apply it.¹⁹¹ Second, several of the Establishment Clause tests suggested by the Justices to replace *Lemon* retain some of its prongs.¹⁹² If the proposed amendments could pass

81 NW. U. L. REV. 1, 25 (1986) (arguing that cases that applied the test consisted of misleading metaphors and phrases that do not explain or justify the Court's decisions); *Id.* at 30-31 (arguing that the test is too ambiguous to establish logically consistent precedent).

188. See Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 359 (1995) (examining the Court's many recent alternative Establishment Clause tests, which he calls as the "shards of *Lemon*"); Michael Stokes Paulsen, *Lemon Is Dead*, 43 CASE W. RES. L. REV. 795, 797 (1993) (emphatically declaring *Lemon* dead and buried, and noting that the "coercion" test might be its replacement); Stephanie E. Russell, *Sorting Though the Establishment Clause Tests: Looking Past Lemon*, 60 MO. L. REV. 653, 663, 676 (1995) (noting that, although the Court dislikes and at times even ignores *Lemon*, lower courts are bound to follow it until the Court agrees on its replacement).

189. See, e.g., *Larson v. Valente*, 456 U.S. 228 (1981); see also *infra* notes 195-197, 206, 222-238 and accompanying text (exemplifying when the *Larson* strict scrutiny test rather than the three prong *Lemon* test applies).

190. As often as *Lemon* is criticized, the Court continues to reaffirm it as the applicable standard of review of Establishment Clause challenges. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (reaffirming *Lemon*'s validity by deciding not to "accept the invitation of petitioners and *amicus* the United States to reconsider our decision in *Lemon v. Kurtzman*"); *Lamb's Chapel*, 508 U.S. at 384. In this case, despite recent criticism, the Court applied *Lemon* to an Establishment Clause challenge. *Id.* at 395.

191. Most lower courts note the Supreme Court's ongoing debate on the validity and the applicability of the *Lemon* test. However, realizing that they are bound to the Court's affirmation of *Lemon*, lower courts must and do apply *Lemon*. See, e.g., *Separation of Church and State Comm. v. City of Eugene*, 93 F.3d 617, 619 (9th Cir. 1996) (noting that the district court had applied *Lemon* and determined that the Establishment Clause was not violated); *Dayton Area Visually Impaired Persons v. Fisher*, 70 F.3d 1474, 1492 (6th Cir. 1995) (applying the three-part *Lemon* test); *Barghout v. Bureau of Kosher Meat and Food Control*, 66 F.3d 1337, 1345 (4th Cir. 1995) (applying the first and second prongs of the *Lemon* test); cf. *Droz v. Commissioner*, 48 F.3d 1120, 1124 (9th Cir. 1995) (noting that a strict scrutiny applies instead of the *Lemon* test); *Church of Scientology Flag Serv. Org., v. Clearwater*, 2 F.3d 1509, 1527 (11th Cir. 1993) (applying the *Lemon* test as the "basic standard of judicial review" in Establishment Clause cases); *Gonzales v. North Township*, 4 F.3d 1412, 1418-19 (7th Cir. 1993) (noting the Court's confused Establishment Clause jurisprudence, but the Seventh Circuit ultimately applied *Lemon* because the Supreme Court has not overruled it).

192. See *Larson*, 456 U.S. at 252 (stating that *Lemon*'s third test was directly implicated in the strict scrutiny test it applied); *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring) (proposing an "endorsement test," which focused primarily on *Lemon*'s first and second prongs: the test's two inquiries are

the *Lemon* test, they would likely pass *Lemon*'s replacement. Finally, confronted with the morass of alternative tests suggested by the Justices, predicting which one test the Court will apply is highly speculative.¹⁹³ Despite *Lemon*'s infamous reputation, applying it to "laws affording uniform benefit to all religions, [but] not to provisions that discriminate among religions"¹⁹⁴ remains the choice most consistent with existing precedent.

C. *The Larson Strict Scrutiny Test: The Court's Alternative to Lemon*

The Court finds *Lemon* inapplicable to some Establishment Clause challenges and occasionally employs a different standard of review. In *Larson v. Valente*,¹⁹⁵ the Court declined to follow the three-part *Lemon* test. In this case, the Court examined a Minnesota statute designed to protect charitable contributors by requiring tax deductible charitable organizations to register with the state.¹⁹⁶ The statute, however, exempted from registration religious organizations that received more than half of their total contributions from members.¹⁹⁷ Because local, established churches qualified for this exemption while transient, new churches did not, the Court ruled that the statute facially and functionally differentiated among religious organizations.¹⁹⁸ Drawing on the

whether the government's actual purpose is to endorse religion and whether the act conveys a message of endorsement); see also *Board of Educ. v. Mergens*, 496 U.S. 226, 234-37 (1990) (applying a three-part "equal access" test); *County of Allegheny v. ACLU*, 492 U.S. 573, 620-21 (1989) (embracing the "endorsement test" in a fractured opinion); *Widmar v. Vincent*, 454 U.S. 263, 270-75 (1981) (applying Justice Powell's "equal access/limited open forum" analysis which focuses on the "primary effect" prong of *Lemon*).

193. The Justices invariably fail to agree upon an alternative or replacement test for *Lemon*. For example, in *Kiryas Joel*, 512 U.S. 687 (1994), the Court splintered in deciding which Establishment Clause standard of review should replace *Lemon*. Justice O'Connor concurred in the decision, but not in the standard of review, stating that rather than rely on a "Grand Unified Theory," *id.* at 717, she would "recognize the relevant concerns in each case on their own terms." *Id.* at 719. Justice Scalia, along with Chief Justice Rehnquist and Justice Thomas, criticized O'Connor's failure to find a replacement for *Lemon* and asserted that "fidelity to the longstanding traditions of our people" should guide the Court's interpretation of the Establishment Clause. *Id.* at 751. Justice Blackmun, apparently realizing that the other Justices failed to employ *Lemon*, concurred to note that *Lemon* still remains a valid standard of review. *Id.* at 714-15.

194. *Larson*, 456 U.S. at 260 (White, J., dissenting).

195. *Id.* at 228.

196. *Id.* at 230-31.

197. *Id.* at 231-32.

198. *Id.* at 246-47 n.23. The Court also reviewed legislative history of the statute, further demonstrating its discriminatory intent. The Court noted one state legislator's description of the statute as an "attempt to deal with the religious organizations . . . who are not substantial religious institutions in . . . our state." *Id.*

"touchstone"¹⁹⁹ of Establishment Clause jurisprudence—that the State may not prefer one religion over another²⁰⁰—the Court held that the statute's differentiation among religions required strict scrutiny review.²⁰¹

In formulating the Establishment Clause strict scrutiny test, the *Larson* Court considered two free speech cases, *Widmar v. Vincent*²⁰² and *Murdock v. Pennsylvania*.²⁰³ Analogizing from these two cases, the *Larson* Court announced a strict scrutiny review that invalidates a religiously preferential statute "unless it is justified by a compelling governmental interest and unless it is closely fitted to further that interest."²⁰⁴

at 254. Another senator stated, "what you're trying to get at here is the people that are running around airports and running around streets and soliciting people and you're trying to remove them from the exemption that normally applies to religious organizations." *Id.* Yet another senator said "I'm not sure why we're so hot to regulate the Moonies anyway." *Id.* at 255. The plaintiff, who challenged the constitutionality of the exemption, was a member of the Unification Church. *Id.* at 232-33. The plaintiff stated that the Unification Church "emphasized" solicitation in public and door-to-door. *Id.* at 234.

199. *Lee v. Weisman*, 505 U.S. 577, 600 (1992) (Blackmun, J., concurring).

200. *Larson*, 456 U.S. at 246 (citing *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947)).

201. *Id.*

202. 454 U.S. 263 (1981). In *Widmar*, the Court examined a University of Missouri regulation that made school facilities available for use by all registered student groups with the exception that no group may use the university's buildings "for purposes of religious worship or religious teaching." *Id.* at 265. The Court evaluated the regulation under free speech doctrine, because the University discriminated against student groups based upon their "desire . . . to engage in religious . . . discourse." *Id.* at 269. In order to justify the restriction of religious student groups' speech, the Court stated that the University "must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* at 270. The University claimed that it could not assist religious groups without offending the Establishment Clause. *Id.* at 270-71. The Court believed that this compelling interest did not apply because once "[t]he University has opened its facilities for use by student groups . . . the question is whether it can now exclude groups because of the content of their speech." *Id.* at 273.

203. 319 U.S. 105 (1943). In *Murdock*, the Court examined whether a city ordinance, requiring all persons who canvass or solicit goods to register with and pay a fee to the city, unconstitutionally restricted free speech. *Id.* at 106-07. Jehovah's Witnesses challenged the city's ordinance as unconstitutionally infringing upon their distribution of religious pamphlets and books. *Id.* at 107. The Court viewed the activities of the Jehovah's Witnesses as forms of speech. *Id.* at 109. The Court's standard of review required that the ordinance be "narrowly drawn" to achieving its purposes. *Id.* at 116-17. The Court held the ordinance not narrowly drawn and therefore unconstitutional, because while the city professed to restrict speech in the name of ensuring its citizens' peace and safety, the Jehovah's Witnesses had not sold their goods in a boisterous or unsafe manner. *Id.*

204. *Larson*, 456 U.S. at 247 (citations omitted). While *Larson* did not rely specifically upon the three-part *Lemon* test, one can argue that it was based upon the Court's emphasis of *Lemon*'s third prong, excessive entanglement. The *Larson* Court itself stated, "Although application of the *Lemon* tests is not necessary to the

*D. Strict Scrutiny Review Under the Establishment Clause**1. A Compelling Interest: The Free Exercise Clause Versus the Establishment Clause*

The government may constitutionally accommodate religious practices despite the fact that the Free Exercise Clause does not compel accommodation.²⁰⁵ The Court has stated that it "in no way suggest[s] that *all* benefits conferred exclusively upon religious groups . . . on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause."²⁰⁶ In other words, an interest sufficiently compelling to survive the *Larson* strict scrutiny test, and a governmental accommodation of religion compelled by the Free Exercise Clause, are not necessarily co-existent.²⁰⁷ While Congress may validly accommodate religious practices in the context of generally available social benefits programs, it does not necessarily follow that Congress is compelled to do so.²⁰⁸ The Establishment Clause saves the government from the potentially and virtually endless duty of accommodating all religious practices.²⁰⁹ Thus, *Larson's* compelling

disposition of the case before us . . . we view the third of those tests [entanglement] as most directly implicated in the present case." *Id.* at 252. Kent Greenawalt argues that Establishment Clause tests other than *Lemon* have evolved from the Justices' emphasis and de-emphasis of individual parts of the *Lemon* test. See Greenawalt, *supra* note 188, at 361-69. Greenawalt refers to Establishment Clause tests based upon the Court's selective emphasis of *Lemon's* three prongs as "shards of *Lemon*." *Id.* at 361. Thus, one prominent shard of *Lemon* is the Court's Establishment Clause test announced in *Larson*.

205. See *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 329-30 (1987) (exempting religious organizations from a prohibition on religious discrimination in employment); *Walz v. Tax Comm'n*, 397 U.S. 664, 666-67 (1970) (providing a tax exemption for property used solely for religious worship).

206. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989).

207. See *Walz*, 397 U.S. at 673.

208. See *United States v. Lee*, 455 U.S. 252, 254-56 (1982) (requiring an Amish employer to participate in the social security system). The Court has generally shown deference to congressional judgment in welfare programs. See *Jefferson v. Hackney*, 406 U.S. 535, 550-51 (1972). In *Jefferson*, the Court reviewed claims by recipients of Aid to Families with Dependent Children, 42 U.S.C. § 601(a). *Id.* at 536-39. The recipients challenged the payments as violating the Equal Protection Clause because "the proportion of AFDC recipients who are black or Mexican-American is higher than the proportion of the aged, blind, or disabled." *Id.* at 538. The Court stated that "so long as [congressional] judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them." *Id.* at 546-47.

209. *Cf. Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947) ("[W]e must be careful in protecting our citizens . . . against State-established churches, to be sure that

interest test in the context of the Establishment Clause remains vital.

2. The "Closely Fitted" Portion of the *Larson* Strict Scrutiny Test

In *Larson*, the Court emphasized that its "inquiry must focus . . . narrowly, upon the distinctions drawn [by the statute among religions, and that] appellants must demonstrate that the challenged [rule] is closely fitted to further the interest that it assertedly serves."²¹⁰ Minnesota's asserted purposes for the statute at issue in *Larson* included safeguarding the public against abusive solicitations and the need for public disclosure by charitable organizations.²¹¹ The *Larson* Court assumed that the statute had a "valid secular purpose," and therefore, *arguendo*, Minnesota would have a compelling interest sufficient to survive the first portion of the Establishment Clause strict scrutiny test.²¹² In addition, the Court found that the state had a "significant interest" in the statute under review by the Court.²¹³ Despite concluding that the Minnesota statute served a valid compelling governmental interest in protecting citizens from fraudulent charities,²¹⁴ the Court held that the statute was not sufficiently closely tailored because none of Minnesota's proffered justifications for the rule demonstrated a logical reason for treating religions differently.²¹⁵ Thus, the Court ruled that the state could not compel the Unification Church to register on the basis of that statute without violating the Establishment Clause.²¹⁶

Since the Supreme Court announced the *Larson* test in 1982, the Court has rarely applied it to an Establishment Clause is-

we do not inadvertently prohibit [the government] from extending its general State law benefits to all citizens without regard to their religious beliefs.").

210. *Larson v. Valente*, 456 U.S. 228, 248 (1982).

211. *Id.*

212. *Id.* (quoting *Valente v. Larson*, 637 F.2d 562, 567 (1981)).

213. *Id.*

214. See *supra* text accompanying notes 2122-213.

215. *Larson*, 456 U.S. at 248-51. The Court described Minnesota's justifications as follows:

[T]hat members of a religious organization can and will exercise supervision and control over the organization's solicitation activities when membership contributions exceed fifty per cent; that membership control, assuming its existence, is an adequate safeguard against abusive solicitations of the public by the organizations; and that the need for public disclosure rises in proportion with the percentage of nonmember contributions.

Id. at 248-49.

216. *Id.* at 255.

sue.²¹⁷ In many cases, the Court applies *Lemon* while explaining that the *Larson* strict scrutiny test remains the appropriate standard of review in cases of preferential or overt discrimination among religions.²¹⁸ Reviewing a few prominent cases will illustrate when the Court deems it appropriate to apply *Larson* instead of *Lemon* in an Establishment Clause challenge.

In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*,²¹⁹ the Court considered a section of a civil rights statute that allowed religious organizations to escape the statute's general mandate against discrimination in employment.²²⁰ Applying the *Lemon* test, the Court held that the exemption does not violate the Establishment Clause.²²¹ The Court dismissed the plaintiffs' argument that the *Larson* test should apply because the statute preferred religious employers over secular employers.²²² The Court stated that "*Larson* indicates that laws discriminating among religions are subject to strict scrutiny."²²³ For laws providing a uniform benefit to all religions, such as the statute in question, the Court responded, "we see no justification for applying strict scrutiny to a statute that passes the *Lemon* test."²²⁴

In *Lynch v. Donnelly*,²²⁵ the Court considered whether a city's display of a crèche, along with a Santa Claus, reindeer and other Christmas decorations, violated the Establishment Clause.²²⁶ Utilizing the *Lemon* test as a guide,²²⁷ the Court held that the city's Christmas display, "notwithstanding the religious signifi-

217. See Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 706-07 (1994) (Blackmun, J., concurring) (characterizing the Court's opinion as tacitly derived from *Lemon*); Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335-39 (1987) (refusing to apply the *Larson* test to a statute that survives *Lemon's* inquiry); Wallace v. Jaffree, 472 U.S. 38, 55-56 (1985) (applying *Lemon's* "secular purpose" criteria); Lynch v. Donnelly, 465 U.S. 668, 679-81 (1984) (applying *Lemon's* "secular purpose" criteria). But see Hernandez v. Commissioner, 490 U.S. 680, 695-96 (1989) (applying *Lemon* after the statute in issue passed *Larson's* test).

218. See *Kiryas Joel*, 512 U.S. at 716-17 (O'Connor, J., concurring in part and concurring in the judgment); *Id.* at 730 (Kennedy, J., concurring in the judgment); Church of Lukami Babalu Aye v. Hialeah, 508 U.S. 520, 535 (1993); *Amos*, 483 U.S. at 338-39.

219. 483 U.S. 327.

220. See *id.* at 329.

221. *Id.* at 335-39.

222. *Id.* at 338-39.

223. *Id.* at 339.

224. *Id.*

225. 465 U.S. 668 (1984).

226. *Id.* at 670-71.

227. *Id.* at 679, 681.

cance of the crèche," did not offend the Establishment Clause.²²⁸ The Court justified its refusal to use the *Lemon* test in *Larson* as based on the "substantial evidence of overt discrimination against a particular church"²²⁹ present in *Larson's* facts.

In *Hernandez v. Commissioner*²³⁰ the Court examined an Internal Revenue Code charitable contributions exemption that permitted taxpayer deductions from income for donations to organizations operating "exclusively for religious purposes."²³¹ Applying *Lemon*, the Court held that the statutory exemption did not violate the Establishment Clause.²³² The Court explained that its conclusion derived from *Lemon* rather than *Larson* because "*Larson* teaches that, when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions."²³³ The Court then reasoned that if the statute is facially neutral, the "customary three-pronged" *Lemon* test provided the proper analytical tool.²³⁴

A closer examination of this line of cases reveals insufficient opportunity by the Court to utilize the *Larson* test, rather than an unwillingness to do so. Governmental units may decide not to pass statutes explicitly preferring one religious denomination over another, perhaps recognizing the legal and political controversy invited thereby. Nonetheless, the Court has apparently mentioned that *Larson* remains a valid Establishment Clause test enough that lower courts should know when to apply *Larson*.²³⁵

228. *Id.* at 687.

229. *Id.* at 679.

230. 490 U.S. 680 (1989).

231. *Id.* at 683.

232. *Id.* at 696-98. In this case, petitioners, who were members of the Church of Scientology, were deducting from their gross income expenditures for the church's "auditing" and "training" sessions. *Id.* at 684-86. The Court held that these expenditures were payments for services, not contributions or gifts, as contemplated in the statutory exemption. *Id.* at 690-94.

233. *Id.* at 695 (quoting *Larson v. Valente*, 456 U.S. 228, 246-47 n.23 (1982)) ("Unlike the Minnesota statute at issue in *Larson*, which [applied to] only those religious organizations that derived more than half their funds from members, [this statute] makes no 'explicit and deliberate distinctions between different religious organizations.'")

234. *Id.*

235. See *Lutheran Soc. Serv. v. United States*, 583 F. Supp. 1298 (D. Minn. 1984), *rev'd on other grounds*, 758 F.2d 1283 (8th Cir. 1985). In this case, the court examined a statute providing tax exemptions for church-affiliated organizations. *Id.* at 1300-01. This court interpreted *Larson* as holding that "laws which favor certain religious denominations over others are subject to strict scrutiny. . . . Strict scrutiny does not apply in this case because the regulation at issue does not draw distinctions among religious denominations. Rather, *all* [churches] are mandatorily [sic] exempt." *Id.* at 1306-07 n.6. In *Church of Scientology Flag Service, Inc.*

IV. *Children's Healthcare v. Vladeck*

A. *The Children's Healthcare Court's Decision*

On February 29, 1996, CHILD²³⁶ filed a motion for a summary judgment with the Federal District Court, District of Minnesota.²³⁷ CHILD also sought a declaration that fifteen statutes and regulations within Title 42 of the U.S. Code violate the Establishment Clause of the U.S. Constitution.²³⁸ These statutes and regulations exclude Church-certified sanatoria from satisfying some of the Medicare and Medicaid programs' minimum qualifications of eligible medical providers.²³⁹ The U.S. Department of Justice and the Church responded by filing briefs in opposition to CHILD's mo-

v. City of Clearwater, 2 F.3d 1514 (11th Cir. 1993), the Eleventh Circuit Court of Appeals, quoting *Larson* in part, stated:

Lemon is not the only guiding light in the Establishment Clause firmament. When the Court found explicitly preferential treatment for one sect over another to be plain on the face of an ordinance, it allowed the government to show that the preference was "closely fitted" to serve a "compelling governmental interest," and invalidated the statute only upon finding that the government had failed to carry this burden.

Id. at 1541 (citation omitted). *Cf. Rupert v. U.S. Fish & Wildlife Serv.*, 957 F.2d 32 (1st Cir. 1992) (per curiam) (examining a statute prohibiting the possession of bald eagles or bald eagle parts). The statute at issue in *Rupert* provided an exception that permitted Native Americans to possess bald eagle parts for religious purposes if such possession did not threaten the legislative goal of eagle preservation. *Id.* at 33. The petitioner was not a Native American, but adhered to a religion that used eagle feathers for "ceremonial" purposes. *Id.* Although the court decided the case under a rational basis test derived from the special nature of Indian law, the court nevertheless suggested that the denominational preference at issue would ordinarily face *Larson's* strict scrutiny. *Id.* at 34-35.

236. See *supra* note 4 (describing the formation and purpose of CHILD).

237. *Children's Healthcare Is a Legal Duty v. Vladeck*, 938 F. Supp. 1466, 1468 (D. Minn. 1996).

238. See Plaintiffs' Notice of Motion and Motion at 1-2, *Children's Healthcare* (No. 3-96 Civ. 63).

239. See *supra* Part II.B. In particular, the petitioner claimed that the following Medicare and Medicaid exemptions and inclusions violated the Establishment Clause: (1) "the inclusion of Christian Science sanatoria in the Medicare Act definition of 'hospital' in 42 U.S.C. § 1395x(e)"; (2) "the inclusion of sanatoria in the definition of 'skilled nursing facility' under 42 U.S.C. § 1395x(y)(1)"; (3) the exemption of Christian Science sanatoria from the quality control peer review organizations set out in 42 U.S.C. § 1320c-3; (4) the exclusion of Christian Science sanatoria from certain requirements of the Medicaid Act; and (5) the exclusion of Christian Science sanatoria from meeting the definition of nursing home. See *Children's Healthcare*, 938 F. Supp. at 1469-71. In all, the plaintiffs challenged the constitutionality of the following fifteen statutes and regulations: 42 U.S.C. §§ 1395x(e), 1395x(y)(1), 1320c-11, 1396a(a), 1396g(e), 42 C.F.R. §§ 466.1, 431.610(b), 440.155(b)(1), 440.170(b)(2), 440.170(c), 442.12(b), 456.251, 456.351, 456.601, 431.701. See Plaintiffs' Notice of Motion and Motion at 1-2, *Children's Healthcare* (No. 3-96 Civ. 63).

tion.²⁴⁰ The Minnesota Civil Liberties Union subsequently submitted a brief as amicus curiae in support of CHILD's motion.²⁴¹

On August 7, 1996, the Honorable Richard Kyle issued a memorandum opinion granting CHILD's motion for summary judgment.²⁴² The court began by acknowledging the existence of judicial contention in regard to Establishment Clause challenges.²⁴³ According to the court, the dissension arose because of the Supreme Court's inconsistent application of standards of review in Establishment Clause challenges.²⁴⁴ In order to properly interpret these inconsistent precedents, the court relied upon *Hernandez* for guidance.²⁴⁵ The court understood *Hernandez* "to mandate that the proper and initial inquiry is whether the law facially differentiates among religions If the law does facially differentiate, strict scrutiny applies."²⁴⁶ The court concluded that imposing Medicare and Medicaid requirements on other religious groups, but not on Christian Scientists, facially differentiates among religions.²⁴⁷ Consequently, the court proceeded to apply the *Larson* strict scrutiny test.²⁴⁸

The court first resolved that the government has a "compelling interest" to legislate Medicare and Medicaid exemptions for the Church.²⁴⁹ The court stated that the government interest in ensuring that "all those who pay taxes to support the programs . . . may benefit from them survives the first prong of the strict scrutiny test."²⁵⁰ Nevertheless, the court declared that be-

240. See *Children's Healthcare*, 938 F. Supp. at 1471.

241. See *id.*; Amicus Curie Minnesota Civil Liberties Union's Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 1, *Children's Healthcare* (No. 3-96 Civ. 63). The MCLU's involvement in this case is a substantial indication of its importance. See David Schultz, *Has Minnesota's Civil Liberties Union Lost Its Teeth?* J.L. & POL., Sept. 1996, at 34 (noting that the MCLU participates in fewer than eight cases each year).

242. *Id.* at 1466, 1486.

243. See *Children's Healthcare*, 938 F. Supp. at 1472-73 (articulating the basic Establishment Clause test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and subsequent opinions which appear to have modified it).

244. *Id.* Indeed, the court admitted that "[p]ost-*Larson* jurisprudence indicates that dissension exists over whether *Larson* should be applied in conjunction with or completely apart from *Lemon*." *Id.*

245. *Id.* (citing *Hernandez v. Commissioner*, 490 U.S. 680, 695 (1989)) (applying facial analysis before the *Lemon* test). For a further discussion of *Hernandez*, see *supra* notes 230-234 and accompanying text.

246. *Id.* at 1473.

247. *Id.* at 1474.

248. *Id.*

249. *Id.* at 1475-78.

250. *Children's Healthcare*, 438 F. Supp. at 1478. The court supported this holding by likening Medicare and Medicaid benefits to unemployment compensa-

cause these exemptions of Church sanatoria are not sufficiently "closely fitted" to achieving the state's compelling interest, they are unconstitutional.²⁵¹ The court based this conclusion upon the fundamental Establishment Clause principle that "government . . . [should] effect no favoritism among sects . . . and that it [should] work deterrence of no religious belief."²⁵² Thus, because the Medicare and Medicaid statutes explicitly provide sect-specific exemptions only for Christian Scientists, the court held that they fail the "close fit" half of the *Larson* strict scrutiny test.²⁵³

Anticipating the enormous implications of its decision and the certainty of an appeal, the court stayed its decision pending the outcome of further litigation.²⁵⁴ Both the Department of Justice and the Church appealed the decision to the U.S. Court of Appeals for the Eighth Circuit.²⁵⁵ In an unusual turn of events, however, on January 24, 1997, U.S. Attorney General Janet Reno announced that the Department of Justice would no longer defend the constitutionality of the Medicare and Medicaid exemptions of Church-certified sanatoria.²⁵⁶ Despite the Department of Justice's withdrawal of support, the Church plans to continue the appeal.²⁵⁷

tion. *Id.* at 1476-77 (citing *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 138-39 (1987) (holding that denial of unemployment benefits to an employee for refusing to work on her Sabbath violated the Free Exercise Clause); *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 719-20 (1981) (holding that the state's denial of unemployment benefits to a man whose religion prevented him from working in the production of armaments was a violation of the Free Exercise Clause); *Sherbert v. Verner*, 374 U.S. 398, 401-02 (1963) (holding that the denial of unemployment benefits to a woman who refused to work on her Sabbath was a violation of the Free Exercise Clause)). The court argued that "the Acts in question are very similar in nature . . . they are public benefits programs widely available to the public." *Id.* at 1478.

251. *Id.* at 1479-81.

252. *Id.* at 1480 (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring)).

253. *Id.* at 1479.

254. *Id.* at 1485-86 ("given the potential impact such an injunction would generate, and the certainty of an appeal, the Court will suspend such injunctive relief" pursuant to FED. R. CIV. P. 62(c)).

255. See *Aid Opposed for Christian Science Care*, L.A. TIMES, Feb. 1, 1997, at B4.

256. See *id.* (noting that the Justice Department, announcing its withdrawal, offered to help Congress draft new legislation that would provide for the needs of the Christian Scientists); Matthew Brelis, *Church Vows to Fight for Medicaid Funds*, BOSTON GLOBE, Jan. 26, 1997, at B2 (reporting that U.S. Attorney General Janet Reno stated "Under controlling Supreme Court precedent, the government can have no articulable interest in guaranteeing non-medical services only for Christian Scientists.").

257. See, e.g., Brelis, *supra* note 256, at B2.

Because Church sanatoria will continue to receive benefits during the appeal, the Church is unlikely to desist voluntarily.²⁵⁸

B. *Analysis of the Children's Healthcare Decision*

Thorough analysis of a constitutional challenge such as *Children's Healthcare* requires examination of three issues: whether the court correctly ascertained the applicable standard of review, whether the court applied it appropriately and whether the outcome reflected sound public policy.

1. *The Children's Healthcare Court Correctly Decided to Apply the Larson Strict Scrutiny Test*

Determining the correct standard of review is critical; application of the three-prong *Lemon* test rather than the *Larson* strict scrutiny test might not necessarily lead to the same conclusion.²⁵⁹ Thus, to a large extent, the outcome of *Children's Healthcare* depended upon which standard the court employed.

Precedent shows that the *Larson* test applies when a statute differentiates or overtly discriminates among religions.²⁶⁰ The *Lemon* test, in comparison, applies when statutes differentiate between religion and non-religion or government.²⁶¹ The Medicare and Medicaid statutes and regulations undoubtedly differentiate among religions. The statutes and regulations exempt only Christian Science sanatoria.²⁶² No other religions are provided similar exceptions.²⁶³ Moreover, only *Church-certified and listed* sanatoria are exempted.²⁶⁴ This sect-specific exemption not only differentiates Christian Science from other religious denominations, but also differentiates among members of the same religion. Thus, because the Medicare and Medicaid programs "single out"²⁶⁵ Chris-

258. See *id.* (noting that the *Children's Healthcare* court's stayed order enables Church sanatoria to receive these interim benefits).

259. See *Lemon v. Kurtzman*, 403 U.S. 602, 614-15 (1971) ("Some relationship between government and religious organizations is inevitable," so the primary inquiry must be "whether the government entanglement with religion is excessive."). Clearly, this "less than excessive" test would permit some laws that strict scrutiny would not.

260. See *supra* notes 219-235 and accompanying text.

261. See *supra* notes 223, 229, 233 and accompanying text.

262. See *supra* Part II.B.

263. See *supra* Part II.B.

264. See *supra* Part II.B. Sanatoria operated by Christian Scientists that are not certified or listed by the Church are not exempt.

265. See *Children's Healthcare Is a Legal Duty v. Vladeck*, 938 F. Supp. 1466, 1478 (D. Minn. 1996). The *Children's Healthcare* court described this differentiation among religions as "singling out." *Id.* at 1479 (adopting the term from *Walz v.*

tian Scientists, these statutory and regulatory exemptions must be strictly scrutinized.²⁶⁶ Therefore, the *Children's Healthcare* court correctly ascertained the standard by which to review the challenged laws and regulations.

The *Larson* strict scrutiny test invalidates a statute that is not religiously neutral,²⁶⁷ "unless it is justified by a compelling governmental interest . . . and is closely fitted to further that interest."²⁶⁸ The *Children's Healthcare* court held that the government has a compelling interest to accommodate Christian Science sanatoria, but that the Medicare and Medicaid exemptions are not sufficiently "closely fitted."²⁶⁹

2. Analysis of the *Children's Healthcare* Court's Finding of a Compelling Interest

The court properly decided that the government has a sufficiently compelling interest to accommodate the Christian Science religion.²⁷⁰ Courts have found a valid purpose in ensuring that individuals may receive generally available benefits without violating their religious beliefs.²⁷¹ Accommodating Christian Scientists' religious beliefs serves several valid purposes.²⁷² For example, accommodating Christian Scientists provides the poor and elderly of the denomination with the same physical nursing care provided to others not of their religion. Such accommodation also promotes fairness by allowing those who contribute to federal programs to benefit from them. Congress may, therefore, accommodate the

Tax Comm'n, 397 U.S. 664, 673 (1970)).

266. See *supra* notes 219-235 and accompanying text.

267. "Religiously neutral" refers to statutes that do not differentiate or discriminate between religions or denominations. See *supra* notes 223, 229, 233 and accompanying text.

268. *Larson v. Valente*, 456 U.S. 228, 247 (1982) (citing *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981); *Murdock v. Pennsylvania*, 319 U.S. 105, 116-17 (1943)).

269. See *Children's Healthcare*, 938 F. Supp. at 1479-81 (finding the exemptions unacceptably narrow). In deciding that the State has a compelling interest in accommodating Christian Science sanatoria, the court considered "the obvious concern of Congress in passing these exceptions: forcing Christian Scientists to choose between: 1) following their religion and enduring financial hardship; or 2) violating an apparently deeply held belief and receiving Medicare and Medicaid benefits." *Id.* at 1476.

270. The court premised its conclusion upon the importance of "allowing Christian Scientists to participate in these otherwise available public programs, to which they have almost certainly contributed part of their wages." *Id.*

271. See, e.g., *Tulsa Area Hosp. Council, Inc. v. Oral Roberts Univ.*, 626 P.2d 316, 321 (Okla. 1981) ("[T]he opportunity of . . . citizens to seek health services in accordance with their preferences is clearly an acceptable secular purpose when examined within the dictates of the Establishment Clause.").

272. See *supra* note 76 and accompanying text (describing the legislative intent behind the Christian Science exemptions).

Christian Science religion as long as it does so within the requirements of the Establishment Clause.²⁷³

The *Children's Healthcare* court acknowledged that the State has a compelling interest in ensuring that all eligible persons may participate in the Medicare and Medicaid programs, but concluded that the exceptions were unacceptably narrow.²⁷⁴ Thus, the court asserted, the exemptions fail the "close fit" portion of the *Larson* strict scrutiny test.²⁷⁵

3. Analysis of the Court's "Closely Fitted" Holding

The Establishment Clause would permit the Medicare and Medicaid statutes' accommodations of Christian Science sanatoria, if sufficiently closely fitted.²⁷⁶ The *Larson* strict scrutiny test emphasizes that determining whether an exemption is closely fitted necessitates focusing on the distinctions the statute draws and determining whether the challenged rule is "closely fitted to further the interest that it assertedly serves."²⁷⁷ Congress enacted the Christian Science exemption with the purpose of providing Medicare and Medicaid benefits to individuals who, because of their religion, would not otherwise receive the benefits.²⁷⁸ The particular exemption Congress enacted, however, improperly furthers its purpose. Congress only exempted Church-certified sanatoria.²⁷⁹ No provision exists for exempting other similar religions, whose adherents may also have beliefs similar to Christian Scientists.²⁸⁰ If Medicare and Medicaid exemptions were not intended to be sect-specific, they would not extend benefits to only one narrowly de-

273. See *Children's Healthcare*, 938 F. Supp. at 1475-76.

274. *Id.* at 1479-81.

275. *Id.*

276. See, e.g., *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707 (1981) (analyzing the Establishment Clause implications of the denial of unemployment benefits to a Jehovah's Witness who terminated his job because his religious beliefs forbade participation in the production of weapons and armaments). The Court ruled that "when the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, . . . a burden upon religious beliefs exists." *Id.* at 717-18. The Court further stated that when such a substantial burden upon the exercise of religion exists, the state should consider granting an exemption accommodating the religious practice at issue. *Id.*

277. *Larson v. Valente*, 456 U.S. 228, 248 (1982).

278. See *supra* note 76 and accompanying text.

279. See *supra* notes 76-94 and accompanying text (revealing that no religions except Christian Scientists were exempted from meeting the Medicare and Medicaid definitions of health care institutions required for eligibility in these programs).

280. See *supra* notes 76-94 and accompanying text.

financed religion. In accordance with *Larson*, the *Children's Healthcare* court correctly determined that these "sect-specific exemptions are not closely fitted to the identified governmental interest."²⁸¹

Despite the sect-specificity of the Medicare and Medicaid exemptions for Church-certified sanatoria, the defendants in *Children's Healthcare* contended that these exemptions should not be strictly scrutinized.²⁸² The defendants argued that because no other religion would benefit from statutory exemptions such as the Christian Science Medicare and Medicaid exemptions, Christian Scientists received no more medical benefits or detriments than other religions and thus, were not singled-out.²⁸³ In rejecting the defendants' argument, the court responded that it would be improper to "assume that there is not nor will there ever be a group in a situation similar to that of the Christian Scientists' current position in order to justify the restriction."²⁸⁴

It should be no surprise that the defendants' argument failed because failure of the argument is consistent with the Supreme Court's decision in *Kiryas Joel*,²⁸⁵ which had already rejected similar reasoning. In that case, the Court invalidated a school district specifically created for the benefit of one religious group.²⁸⁶ The Court recognized, that if state statute were permitted to stand, there could be "no assurance that the next similarly situated group seeking a school district of its own [would] receive

281. *Children's Healthcare Is a Legal Duty v. Vladeck*, 938 F. Supp. 1466, 1479 (D. Minn. 1996).

282. *Id.* at 1480.

283. *Id.* According to the defendants:

The reason Christian Scientist sanatoria were singled out by name in the exemptions, was that, at the time the Medicare and Medicaid Acts were being contemplated and refined by Congress, it was the only religious group which came forward with a network of health care facilities standing as an alternative to traditional medical care.

Id.

284. *Id.* In response to the defendants' argument, the court concluded that "there is no guarantee that a religious group in a similar situation to the Christian Scientists (i.e., religious group believing in faith healing which has set up certain institutions to promote such healing) would receive a similar accommodation from Congress." *Id.*

285. *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994).

286. *Id.* at 697, 702 (holding that the school district violated the Establishment Clause because it delegated governmental authority over public schools to a religious community and provided the benefit of a special school district to only one religious denomination, with no guarantee that other similarly situated denominations would receive similar benefits). See also *supra* notes 178-186 and accompanying text.

one."²⁸⁷ This lack of assurance, in effect, rendered the school district statute as non-neutral among religions and preferring religion over nonreligion, both of which are violations of the Establishment Clause.

The argument that no other religion may presently share the Christian Scientists' beliefs does not rectify the sect-specificity of the Medicare and Medicaid exemptions. The Medicare and Medicaid statutes fail to ensure similar exemptions for similarly situated denominations.²⁸⁸ This sect-specific treatment cannot be countenanced with the basic Establishment Clause principle that the government may not prefer one religion over another.²⁸⁹ Furthermore, while no other religion may precisely share Christian Science's certification and listing procedure, other religions practice spiritual therapy.²⁹⁰ Thus, any contentions that the Medicare

287. *Kiryas Joel*, 512 U.S. at 703.

288. See *supra* notes 76-94 and accompanying text.

289. See, e.g., *Kiryas Joel*, 512 U.S. at 696 (striking down the delegation of authority over public schools in a particular school district to a religious group); *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985) (striking down a state enactment of prayer activities in all public schools); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (striking down a state statute forbidding the teaching of scientific evolution in state supported schools); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 216-17 (1963) (striking down a state law and school board requirement that religious prayer is recited in the public schools at the beginning of each school day).

290. F.E. MAYER, *THE RELIGIOUS BODIES OF AMERICA* 523-45 (1954). There are so many religions that engage in spiritual healing, Mayer stated, that "it is impossible to classify all of them. . . . They can most conveniently be treated under four groups." *Id.* at 523. Mayer grouped religions that believe in spiritual healing into Christian Science, Unity Church of Christianity, New Thought and other movements such as I Am, Father Divine and Psychiana. *Id.* at 524. According to Mayer, the Unity Church of Christianity is very similar to Christian Science. *Id.* at 537-38. The Unity Church believes that physical illness is the result of sin, *id.* at 539, and emphasizes daily spiritual meditations in order to transform physical bodies with spiritual ones, thus curing any sickness, *id.* at 538-39. New Thought, which is a generic term for "score[s] of metaphysical cults associated in the National New Thought Alliance, formed in 1895. *Id.* at 540. Some of the many religious bodies associated in the New Thought Alliance include: Chapel of Truth, Christian Assembly, Church of Truth, Christian Science Liberals, Unity Church of Truth and Fellowship of Divine Truth. *Id.* at 542. New Thought closely resembles both the Christian Science and the Unity Church doctrines. *Id.* at 540. Specifically, New Thought holds the view that every person possesses an inner spiritual power which can change disease into harmony, and pain into health and strength. *Id.* at 541. The I Am, Father Divine and Psychiana religions similarly believe in spiritual intervention and spiritual healing of the sick divine metaphysics. *Id.* at 542-45. See also J. PAUL WILLIAMS, *WHAT AMERICANS BELIEVE AND HOW THEY WORSHIP* 327-62 (1952) (examining several religious denominations that rely upon spiritual healing, including Christian Science, The Pentecostal Holiness Church and the Unity School of Christianity). Religions that rely upon spiritual healing are also found outside of the United States. See, e.g., M.L. DANEEL, *ZIONISM AND FAITH-HEALING IN RHODESIA* (1970) (discussing the aspects of African Independent

and Medicaid exemptions for Church-certified sanatoria are a sufficiently close fit rest upon a faulty premise.

V. Popularity, Potential Benefit and Public Policy Support a Non-Sectarian Spiritual Healing Exemption

One cannot simply dismiss faith or spiritual healing as entirely ineffective. Whether or not one subscribes to alternative medicines such as spiritual healing, recent medical studies indicate that "there is more to patient interest [in alternative medicines] than delusion, gullibility and desperation."²⁹¹ Moreover, Congress has repeatedly recognized the public's interest in alternative medicines. The 1965 Christian Science Medicare and Medicaid exemptions manifest this recognition. In 1992, Congress established the Office of Alternative Medicine [OAM] "to facilitate the evaluation of alternative medical treatments."²⁹² The prevalence of alternative therapies has also fostered legislative consideration of a more tolerant attitude toward their practice. At least one proposed bill, the Access to Medical Treatment Act,²⁹³ emphasized the importance of giving patients access to a fuller range of treatments than those authorized by Western medicine or currently accepted by the Federal Drug Administration.²⁹⁴

Churches). Daneel researched the Zionist Church, a popular African religion. *Id.* at 11-12. Zionists stress the importance of faith healing. *Id.* at 16. In fact, Zionists have a system of buildings that house the sick while they receive spiritual healing called "hospitara," which are similar to Christian Science sanatoria. *Id.* at 27-35.

291. Michael Cohen, *Holistic Health Care: Including Alternative and Complementary Medicine in Insurance and Regulatory Schemes*, 38 ARIZ. L. REV. 83, 104 (1996) (describing medical studies which conclude that holistic healing is of value to many medical patients).

292. See Larry Dossey & James P. Swyers, *Introduction to OFFICE OF ALTERNATIVE MED., ALTERNATIVE MED.: EXPANDING MEDICAL HORIZONS, A REPORT TO THE NATIONAL INSTITUTES OF HEALTH ON ALTERNATIVE MEDICAL SYSTEMS AND PRACTICE IN THE UNITED STATES* xlvii [hereinafter OAM REPORT TO NIH] (discussing the role of alternative medicine in society). OAM is a branch of the National Institute of Health. *Id.* at xlvii. Congress mandated the OAM "to facilitate the evaluation of alternative medical treatments that might provide promise for addressing a number of serious health problems that afflict the Nation." *Id.* In addition, OAM was mandated to facilitate research and coordinate the exchange of information about alternative medicines. *Id.*

293. H.R. 2019, 104th Cong. (1995); see also S. 1035, 104th Cong. (1995) (the companion Senate version of the Act).

294. This bill would allow a health practitioner to treat a patient with nearly any treatment that individual patient desires. H.R. 2019, 104th Cong. § 3 (1995). The main limitations, however, are that the treatment itself does not pose an unreasonable and significant danger to the patient, and that the patient is fully informed of all the risks of the requested therapy. *Id.* This bill would still require all physicians to be legally authorized to provide treatment. *Id.* at § 2. See also Cohen, *supra* note 291, at 148 (recounting the congressional testimony of Berkley

Recent medical studies show that Americans increasingly receive alternative therapies.²⁹⁵ One in three respondents in a national survey reported using at least one alternative therapy during 1990, resulting in an estimated 425 million visits to providers of alternative therapy.²⁹⁶ Americans surveyed used alternative therapies in the following proportions: relaxation techniques (13%), chiropractic (10%), massage (7%), imagery, biofeedback and hypnosis (6%), and spiritual healing (4%).²⁹⁷ Because of the broad spectrum of alternative medicines,²⁹⁸ which to many Americans seem exotic and mysterious,²⁹⁹ this survey may prove to be less than perfectly accurate. Even given statistical error, however, these studies demonstrate that many Americans wish to receive alternative medical treatments.

Bedell, who left Congress because of Lyme disease, which \$26,000 worth of conventional treatments failed to cure, but who returned to personally attest to the benefit of a \$500 alternative therapy which he claimed cured him of his disease). Former congressman Bedell commented, "It breaks my heart to have to tell the Lyme disease patients who contact me because their pharmaceutical treatments are not curing them, that the cow's milk treatment that I believe cured me is not available to them because of government regulations." *Id.*

295. For a comprehensive report of medical studies of numerous alternative medicines, see OAM REPORT TO NIH, *supra* note 292.

296. David M. Eisenberg et al., *Unconventional Medicine in the United States: Prevalence, Costs, and Patterns of Use*, 328 NEW ENG. J. MED. 246 (1993). The "unconventional therapies" mentioned in the survey included Chiropractic, massage and relaxation techniques. *Id.* A brief review of Dr. Eisenberg's conclusions are as follows:

Extrapolation to the U.S. population suggests that in 1990 Americans made an estimated 425 million visits to providers of unconventional therapy. This number exceeds the number of visits to all U.S. primary care physicians (388 million). Expenditures associated with the use of unconventional therapy in 1990 amounted to approximately \$13.7 billion, three-quarters of which (\$10.3 billion) was paid out of pocket. This figure is comparable to the \$12.8 billion spent out of pocket annually for all hospitalizations in the U.S.

Id. Additionally, Dr. Eisenberg summarized his study in testimony before a congressional subcommittee. See *Alternative Medicine: Hearings Before a Subcomm. of the Senate Comm. on Appropriations*, 103rd Cong., 1st Sess. 9 (1993) [hereinafter *Alternative Medicine Hearings*] (statement of Dr. David M. Eisenberg). Dr. Eisenberg concludes that (1) the costs and prevalence of alternative medicine are far greater than previously reported, (2) medical schools should offer more alternative medicine courses to better prepare doctor and (3) alternative therapy must be studied more by medical institutes and the government. *Id.* at 10-11.

297. Eisenberg et al., *supra* note 296, at 248 tbl. 2. Arguably, Christian Science sanatoria provide the equivalent of many of these therapies.

298. See, e.g., OAM REPORT TO NIH, *supra* note 292 (examining no fewer than one dozen different systems of alternative treatments).

299. See Raymond H. Murray & Arthur J. Rubel, *Physicians and Healers—Unwitting Partners in Health Care*, 326 NEW ENG. J. MED. 61 (1992) (discussing the hodgepodge of beliefs and treatments that make up alternative medicine); *Alternative Medicine Hearings*, *supra* note 296, at 10 (testimony of Dr. David M. Eisenberg) (noting the difficulties inherent in defining alternative medicines).

Recipients of alternative treatments are not the only persons who have recognized the significance of unconventional therapies. At least twenty-six major medical schools now offer courses on alternative medicines.³⁰⁰ In addition, practicing physicians have extolled the benefits of alternative medicines.³⁰¹ A recent survey of 572 board certified physicians found that "92% encouraged at least one unconventional therapy, 83% at least two, 73% at least three, 63% at least four . . . [In addition,] 36% of these physicians practiced at least one unconventional therapy."³⁰² Given the increasing popularity of alternative therapies and the prevalence of research suggesting their medical benefits, Congress should amend the Medicare and Medicaid statutes to accommodate selected alternative therapies.

Amending Medicare and Medicaid amendments to accommodate more alternative therapies places the drafter in a conundrum: On the one hand, the popularity of alternative therapies precludes the drafting of amendments to accommodate every alternative therapy.³⁰³ On the other hand, the popularity of these alternative

300. See Cohen, *supra* note 291, at 105 (listing some of the most prominent medical schools which now offer alternative medicines courses, including Columbia University College of Physicians and Surgeons, Harvard Medical School, John Hopkins School of Medicine and UCLA School of Medicine).

301. See Daniel L. Blumberg et al., *The Physician and Unconventional Medicine*, ALTERNATIVE THERAPIES IN HEALTH AND MED. July 1995, at 31. In this survey, "unconventional therapies" were defined as those "not normally taught in medical schools" or generally available at U.S. hospitals. *Id.* However, the administrator of this survey noted that these results may fluctuate as more medical schools begin to teach courses on alternative medicine. *see id.* at 33.

302. *Id.* at 32.

303. As Eisenberg's statistics demonstrate, this would require the Medicare and Medicaid programs to reimburse alternative therapy recipients for an estimated 425 million visits per year at a cost of \$13 billion per year. *See* text accompanying note 296. This would heavily strain Medicare and Medicaid programs that are already struggling. *See* CONGRESSIONAL BUDGET OFFICE, THE ECONOMIC AND BUDGET OUTLOOK: FISCAL YEARS 1997-2006, A REPORT TO THE SENATE AND HOUSE COMMITTEES OF BUDGET 71 (1996) [hereinafter CBO REPORT] (explaining that the funding of Medicare is of "particular relevance" as a result of the increasing number of elderly individuals entitled to benefits and the decreasing number of tax-paying individuals).

Such a massive increase in the number of visits to alternative care providers could lead to Medicare and Medicaid budgetary disaster, especially given the projected shortfalls for these entitlement programs. *See id.* at 69 ("[S]hortfalls projected [for entitlement programs] for future years are so large that they could put an end to the upward trend in living standards that the nation has long enjoyed."). Moreover, "[f]inancing the growth in entitlements through ever-increasing deficits is not a viable option. . . . At some point, taxes will have to be raised or the growth of spending curbed." *Id.* Thus, the economic consequences of amending Medicare and Medicaid hinders amendments that would accommodate every alternative care.

therapies necessitates that the government at least be aware of alternative therapies and seek to incorporate some of them into Medicare and Medicaid programs.³⁰⁴

Assuming that Medicare and Medicaid programs cannot cover every recipient's expenses for every alternative therapy, but that the government should attempt to accommodate participants' medical care of choice, it becomes apparent that the government should amend the Medicare and Medicaid programs to accommodate spiritual healing. The unique qualities of spiritual healing demands that it be accommodated before any other alternative therapy.

Most individuals seek alternative treatment because of curiosity,³⁰⁵ cost savings,³⁰⁶ dissatisfaction with conventional medicine³⁰⁷ or because they have a chronic disease.³⁰⁸ Individuals who engage in spiritual treatment, however, are different in that they seek alternative treatment because of deeply held religious be-

304. After all, the Medicare and Medicaid programs do intend to allow patients to choose the providers of their medical care. See *infra* note 330 and accompanying text. Additionally, the rising acceptance of alternative medicines among patients, medical schools and physicians may lead to an increased prescription of these alternative treatments. See *supra* notes 295-302 and accompanying text. As a result, the government must be aware of these treatments in order to perform its regulatory role. See GILL WALT, *HEALTH POLICY: AN INTRODUCTION TO PROCESS AND POWER* 11-15 (1994) (arguing that governments should be centrally involved in health regulation, which for most governments includes the regulation of health workers, the production and distribution of pharmaceuticals, disease control and the general provisions of health care).

305. See BRENNEMAN, *supra* note 40 (recounting various individuals' experiences with alternative therapies). Brennenman emphasizes that individuals often engage in faith healing because they are curious. *Id.* at 11-18. In fact, Brennenman begins his book by stating that "America loves a mystery," *id.* at 11, and that alternative therapies movements are based upon America's fascination with the unknown, *id.* at 11-18.

306. See, e.g., Barbara J. Safriet, *Healthcare Dollars and Regulatory Sense*, 9 YALE J. ON REG. 417 (1982) (analyzing the cost-effectiveness of various health care providers).

307. See OFFICE OF TECH. ASSESSMENT, U.S. CONGRESS, NURSE PRACTITIONERS, PHYSICIANS ASSISTANTS, AND CERTIFIED NURSE-MIDWIVES: A POLICY ANALYSIS 34 (1986) (discussing how patients who receive their obstetric care from certified nurse-midwives were generally more satisfied with the care they received than patients who used a conventional obstetrician); Chip Brown, *The Experiments of Dr. Oz*, N.Y. TIMES MAG., July 30, 1995, at 19, 21 (discussing a general perception that conventional medical care providers are less concerned with the art of healing than are alternative medical providers).

308. Additionally, many patients with illnesses or injuries such as AIDS, arthritis, allergies, many forms of cancer, depression and severe digestive problems cannot at this time effectively be treated by conventional medicine. Cf. Larry Dossey, MD, *What Does Illness Mean?*, ALTERNATIVE THERAPIES IN HEALTH AND MED. July 1995, at 6, 9. Therefore, alternative therapies may provide the only potential cure for such medical conditions.

liefs.³⁰⁹ Such beliefs, the Supreme Court has stated, merit protection of the "highest order."³¹⁰ Thus, although many individuals seek alternative therapies for many reasons, none are more compelling or fundamentally important than adhering to one's religion.

VI. Proposed Medicare and Medicaid Exceptions for Christian Science Sanatoria

Public policy requires statutory exemptions that would allow individuals who maintain beliefs similar to Christian Scientists to practice their religion and to receive Medicare and Medicaid benefits. Medicare and Medicaid's exemptions of Church-certified sanatoria should be replaced with neutral, non-sectarian language.³¹¹ To this end, Medicare and Medicaid exemptions should be amended so that references to "Christian Science" are replaced with "competent adults whose religion compels engaging in healing by spiritual means."³¹²

309. See generally ROBERT C. FULLER, *ALTERNATIVE MEDICINE AND AMERICAN RELIGIOUS LIFE* (1989) (discussing the history of alternative therapy systems in the United States and the participants in these systems). See also *supra* notes 11-46 and accompanying text (describing Christian Science's belief in and system of alternative therapy providers).

310. See *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (discussing the high level of protection given religious freedoms and beliefs).

311. The *Children's Healthcare* court correctly declared the Medicare and Medicaid exemptions for the Christian Science sanatoria as unconstitutional. See *supra* notes 276-290 and accompanying text. Although the court recognized the importance of governmental accommodation of citizens' religious beliefs, it also recognized that the government's preference of one religious sect over others violates the Establishment Clause. See *supra* notes 267-275 and accompanying text. Thus, if one considers only the constitutionality of the Medicare and Medicaid exemptions for Christian Science sanatoria, the court reached the correct decision. But, if one considers general public policy principles, such as ensuring that persons who contribute money to a generally available governmental program should have the opportunity to participate in that program, the court's decision is improper. See *supra* Part V.

312. See Jennifer L. Rosato, *Putting Square Pegs in a Round Hole: Procedural Due Process and the Effect of Faith Healing Exemptions on the Prosecution of Faith Healing Parents*, 29 U.S.F. L. REV. 43, 119 n.410 (1994) ("If the legislature were to amend its faith healing exemptions . . . [s]uch language should be replaced by language that would be applicable to all religions, such as extending protection to persons who are engaged in healing by 'spiritual means or prayer.'") See also Christine A. Clark, *Religious Accommodation and Criminal Liability*, 17 FLA. ST. U. L. REV. 559, 588 (1990) (proposing that the Florida religious accommodation exemption extend to parents who are "sincerely practicing [their] religious beliefs"). But see generally Ann MacLean Massie, *The Religion Clauses and Parental Health Care Decisionmaking for Children: Suggestions for a New Approach*, 21 HASTINGS CONST. L.Q. 725 (1994) (concluding that extending statutory exemptions to protect persons who engage in healing by 'spiritual means or prayer' raises issues of free exercise of religion, establishment of religion and equal protection;

The current allocation of Medicare and Medicaid funds would remain. The Medicare and Medicaid programs would only reimburse participants' care providers for their room, board and general nursing expenses. As with the Christian Science exemptions, spiritual healers would not be reimbursed for their services.

The proposed amendments would allow only competent adults to engage in spiritual therapy exempted by the Medicare or Medicaid programs. This ensures that persons are capable of carefully considering their medical options and are fully aware of the consequences when deciding to engage in spiritual healing. Additionally, a "competent-adult requirement" would preempt potentially explosive litigation involving parents who refuse to seek conventional medical treatment for their children.³¹³

The proposed amendments would result in relatively minimal economic³¹⁴ and numerical³¹⁵ consequences. Only competent

thus, regardless of the particular language, all faith healing exemptions violate the Establishment Clause).

313. Currently, nearly every state has exemptions protecting "parents from certain kinds of liability when they provide faith healing to their children in accordance with their good religious beliefs." Rosato, *supra* note 312, at 51-63 (reviewing each state's faith healing exemptions). The reality is, therefore, that some children die because their parents did not seek conventional, modern medicine for the child. See, e.g., *id.* at 44-46 (describing the death of Robyn Twitchell, a two-year-old child who died when his parents provided faith healing instead of medical care). Lawsuits invariably result, with parents, guardians, spiritual healers and churches defending against child neglect, abuse and manslaughter claims. See, e.g., *Commonwealth v. Twitchell*, 617 N.E.2d 620 (Mass. 1993) (remanding for a new trial a spiritual healing case where parents were not allowed to use the affirmative defense of notice); *State v. McKown*, 475 N.W.2d 63 (Minn. 1991) (dismissing criminal charges because the state officially advised the defendants that they would be permitted to rely on spiritual treatment and prayer in the care of their child); *Walker v. Superior Court*, 763 P.2d 852 (Cal. 1988) (denying a motion to dismiss criminal charges arising from the death of defendant's child after defendant provided spiritual treatment instead of medical care).

Allowing parents to decide to not seek medical treatment for their children is a controversy outside of the scope of this paper. For articles discussing these spiritual exemptions, see Rosato, Massie or Clark, *supra* note 14. To avoid this controversy entirely, this Comment proposes amendments that would only reimburse the costs of room, board and physical nursing services provided to competent adults.

314. In terms of economic consequences, a relatively insignificant amount of Medicare and Medicaid funding would be expended on the proposed amendments. Eisenberg's research found that in 1990 about \$13.7 billion was expended on all unconventional therapies. Eisenberg, *supra* note 296, at 248. This study also concluded that of all individuals receiving unconventional therapies in 1990, only about 4% received spiritual treatment. *Id.* Assuming that the billing rate of spiritual treatment was equivalent to the billing rate of other unconventional therapies, of the \$13.7 billion expended on all unconventional treatment approximately \$340 million was spent on spiritual treatment. *Id.* However, this \$340 million overestimates the potential expenditures for the proposed Medicare and Medicaid amendments, because Eisenberg's study defined individuals who receive spiritual treatment as those who had received this therapy once in the past year, *id.*, while the proposed Medicare and Medicaid amendments would be available to persons

adults who are needy, elderly or otherwise eligible to receive Medicare or Medicaid benefits could exercise this exemption.³¹⁶ In addition, only those competent adults whose religion compels engaging in spiritual treatment could participate.³¹⁷ Because the number of members in established faith or spiritual healing organizations is limited,³¹⁸ and because probably not all of these persons are likely to be presently eligible to receive Medicare or Medicaid benefits, the consequences of a spiritual healing exemption would be minimal.³¹⁹ Moreover, obviously not many persons would, at the passage of the proposed amendments, decide to rely upon spiritual-based medical therapy. Rather, persons who wish to receive conventional medical treatment will continue to do so. However, persons who desire to receive only spiritual medical treatment would have better access to facilities that provide such treatment.³²⁰

Allowing persons to engage in spiritual healing would not contravene the government's role in regulating medical providers. The government has two general roles in the regulation of medical care providers: first, protecting the public from unsound practitioners, treatment or advice and second, directing the public to

who rely upon spiritual treatment (presumably, fewer individuals rely upon spiritual treatment than individuals who have received only spiritual treatment within the past year). CBO data indicates that in 1990 \$148.5 billion was spent for both the Medicaid and Medicare programs. See CBO REPORT, *supra* note 303, at 142. Thus, even the generous \$340 million estimated to have been expended for spiritual treatment is a very small percentage of the total Medicare and Medicaid budget.

315. In terms of numbers of individuals who could benefit from the Medicare and Medicaid amendments for spiritual healing, the consequences would be minimal. In Dr. Eisenberg's study, one in three respondents reported engaging in at least one unconventional therapy during 1990. See Eisenberg, *supra* note 296, at 248. Of the respondents who had engaged in an unconventional therapy, only 4% reported to have engaged in spiritual healing. *Id.* Extrapolating Dr. Eisenberg's statistics to the U.S. population suggests that at the most only a fraction of 1% of Americans regularly engage in spiritual healing (4% of 33% of the population = .013% of the population).

316. Because Eisenberg's study did not limit the respondents to individuals eligible to participate in the Medicare and Medicaid programs, see *id.*, this condition upon participation further narrows the economic and numerical consequences of an amendment for individuals who engage in spiritual healing.

317. See *supra* note 312 and accompanying text.

318. See *supra* notes 315-316.

319. See Rosato, *supra* note 312, at 116-18 (discussing the impacts of legislative reform on the prosecution of faith healing parents).

320. It is important to emphasize again that Medicare and Medicaid recipients receiving spiritual or prayer-based treatment would receive Medicare or Medicaid funding to support only the nursing and room and board of the alternative medicine provider's facility—the same funding which conventional medicine providers receive.

proper medical care.³²¹ In other words, as the Court has proclaimed, protecting the public "against the consequences of ignorance" is the fundamental purpose for governmental regulation of medical practice.³²² Yet if persons who forego conventional medical therapy have strong convictions for doing so,³²³ and if such strong convictions are usually arrived at only after careful deliberation,³²⁴ it can be argued that such persons are not 'ignorant' of their medical options. Instead, these individuals conscientiously choose spiritual or faith healing over conventional medicine.³²⁵

VII. Amended Medicare and Medicaid Statutes Would Pass Constitutional Scrutiny

By amending the Medicare and Medicaid statutory exemptions to competent adults whose religious beliefs compel engaging

321. Bloomberg, *supra* note 301, at 85. See *People v. Amber*, 349 N.Y.S.2d 604, 612 (Sup. Ct. 1973) (upholding indictment of acupuncturist as engaged in the illegal practice of medicine); *People v. Steinberg*, 73 N.Y.S.2d 475, 577 (Magis. Ct. 1947) (denying dismissal of charges against nurse for holding herself out as qualified to vaccinate people against smallpox).

322. *Dent v. West Virginia*, 129 U.S. 114, 122 (1888). This statement of governments' interest in regulating the provision of health care is greatly simplified. See generally FRED M. FROHOCK, *HEALING POWERS: ALTERNATIVE MEDICINES, SPIRITUAL COMMUNITIES, AND THE STATE* (1992) (examining governments' regulatory interests in the context of spiritual healing). Frohock argues that traditionally, the state would not regulate individuals' selection of medical care, "so long as two conditions are met: (1) the individual is legally competent, and (2) the act does not adversely affect the interests of a third party." *Id.* at 146. Today, Frohock notes, the state's interest in health is regulation and thereby includes "(1) preservation of life, (2) prevention of suicide, (3) protection of innocent third parties, and (4) maintaining the ethical integrity of the medical profession." *Id.* at 147. Frohock concludes:

All of these interests, however, can be overridden in the singular actions of a competent individual. The free exercise clause of the First Amendment protects individuals from state interference in decisions over medical care based on religious beliefs so long as the individual is competent and the decision primarily affects only the individual.

Id.

323. See *supra* notes 309-320 and accompanying text.

324. See generally FULLER, *supra* note 309 (documenting the experiences of several persons who rely upon spiritual healing and describes both their successes and failures, and how spiritual healing affects the lives of those relying upon spiritual therapy).

325. Recent research disproves the stereotype that individuals who seek alternative therapies are poor, illiterate or ignorant. See Eisenberg et al., *supra* note 296, at 248. Dr. Eisenberg's study suggests that more educated and wealthier individuals choose alternative therapies more frequently than less educated or poor individuals. *Id.* For example, the use of unconventional therapies was significantly more common among people with some college education than those with no college education and significantly more common among people with annual incomes above \$35,000 than among those with lower incomes. *Id.*

in healing by spiritual means, the exemptions become neutral among religions. Of course, the amended Medicare and Medicaid exemptions would still be subject to Establishment Clause challenges. Because the amended statutes would be neutral among religions, the *Lemon* test rather than the *Larson* test would apply.³²⁶ Accordingly, this section applies the *Lemon* test to the proposed Medicare and Medicaid amendments and concludes that they would survive constitutional scrutiny.

In order for a statute to survive an Establishment Clause challenge, the *Lemon* test requires that it has a secular purpose that as a primary effect neither advances or inhibits religion nor fosters excessive government entanglement with religion.³²⁷

A. *Secular Purposes for the Proposed Amendments*

The Court seems to accept nearly any plausible purpose the legislature proffers as secular.³²⁸ Consequently, the Medicare and Medicaid exemptions for competent adults who engage in healing by spiritual means will easily pass the first prong. These amendments would serve at least four secular purposes. First, amending the Medicare and Medicaid statutes furthers the very purpose of these programs. Medicare and Medicaid's two fundamental objectives include providing indigent, disabled, old or otherwise eligible persons, with needed health care services.³²⁹ Further, they allow recipients to choose freely, without unnecessary government interference, the particular type and provider of health care they wish to receive.³³⁰ Even individuals who engage in spiritual healing

326. See *supra* Part III.B (concluding that Establishment Clause challenges are adjudicated by application of the three-part *Lemon* test, unless the challenged statute differentiates among religions, in which case the *Larson* strict scrutiny test applies).

327. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123-24 (1982) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 634 (1971)). See *supra* notes 117-117 and accompanying text (explaining in detail the Court's various interpretations of *Lemon's* three-prong test).

328. See *Edwards v. Aguillard*, 482 U.S. 578, 586 (1986) ("While the Court is normally deferential to a state's articulation of a secular purpose it is required that the statement of such purpose be sincere and not a sham.").

329. See, e.g., 42 U.S.C. § 1395c (1994) (explaining Medicare's purpose of "provid[ing] basic protection against the costs of hospital . . . for . . . individuals who are age 65 years or over and are eligible for retirement benefits. . . ."); 42 U.S.C. § 1396 (1994) (setting forth Medicaid's purpose of "furnish[ing] . . . medical assistance on behalf of families with dependent children and of aged, blind, or disabled individual, whose income and resources are insufficient to meet the costs of necessary medical service"); 42 C.F.R. § 440.155(b)(1); 42 C.F.R. § 440.170(b) and (c).

330. See, e.g., 42 U.S.C. § 1395(a) (1994) ("Any individual entitled to insurance benefits under [Medicare] may obtain health services from any institution, agency,

may require general nursing care such as assistance with eating and bathing.³³¹ When an individual is unable to care for himself while receiving spiritual treatment, he will require physical nursing care. Consequently, room, board and basic nursing expenses will be incurred.³³² The Medicare and Medicaid programs were designed to provide these services to individuals whose resources are insufficient to pay for such expenses.³³³ The proposed amendments would provide basic nursing care to individuals while they receive spiritual treatment. Ensuring that participants receive fundamental nursing care, regardless of the specific treatment sought, advances the government's first secular purpose of providing necessary nursing services to persons who could otherwise not afford them.

Second, the proposed amendments would further the Medicare and Medicaid programs' purpose of ensuring that all eligible persons may participate in the Medicare and Medicaid programs without interfering with their religion. Individuals who engage in

or person qualified to participate under [Medicare] if such institution, agency, or person undertakes to provide him such services.").

[A]ny individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required (including an organization which provides such services, or arranges for their availability, on a prepayment basis) who undertakes to provide him such service"

1396(a)(23)(A) (1994).

Nothing in [Medicaid] shall be construed to require any State . . . to compel any person to undergo any medical screening, examination, diagnosis, or treatment or to accept any other health care or services provided under such plan for any purpose (other than for the purpose of discovering and preventing the spread of infection or contagious disease or for the purpose of protecting environmental health), if such person objects (or, in the case such person is a child, his parent or guardian objects) thereto on religious grounds.

42 U.S.C. § 1396f (1994)

Of course tension does exist. On one side, is the necessity of the government to maintain economically efficient Medicare and Medicaid programs by regulating the medical services provided. Conversely, Congress desires to (and sometimes must) accommodate participants' religious beliefs at the expense of maximum program efficiency. The proposed amendments would have minimal effects, and, accordingly, the balance between the two sides would not be upset.

331. See *supra* notes 25-31 and accompanying text. This need for nursing care is why Eddy designed the Church system of sanatoria. Congress has recognized this need as well, in fact it was a primary reason why Congress exempted Church-certified sanatoria in 1965.

332. See, e.g., Eisenberg et al., *supra* note 296 and accompanying text. The \$13 billion expended last year for alternative treatments amply demonstrates that alternative medicines are not free. See also *supra* note 31 and accompanying text (noting the exorbitant cost of a Christian Science sanatorium located in St. Louis).

333. See *supra* notes 50-53, 67 and accompanying text (discussing the purpose of the Medicare and Medicaid programs).

spiritual healing and require nursing care, but who cannot afford to pay for necessary basic nursing services, must choose either to adhere to their religious beliefs and not receive general nursing care or participate in the Medicare and Medicaid programs at the expense of violating their religious beliefs.³³⁴ The Medicare and Medicaid programs recognize that individuals should not be forced to decide between medical care and religious beliefs.³³⁵ Accordingly, the proposed amendments would allow Medicare and Medicaid recipients to obtain necessary nursing care without compromising their religious beliefs.

Third, amending the Medicare and Medicaid statutes also serve a secular purpose of providing most, if not all, contributors to the programs the ability to also benefit from them. The Medicare and Medicaid programs are supported by taxes imposed upon income.³³⁶ Presumably, like all Americans earning an income, persons who engage in spiritual healing contribute dollars that fund the Medicare and Medicaid programs. Ensuring that all persons whose taxes finance a generally available program may also participate in that program may not be a compelling governmental interest.³³⁷ Nonetheless, the lack of a legally compelling governmental interest does not diminish the important secular purpose of providing a program's benefits to the individuals whose taxes support the program.³³⁸

Fourth, the proposed amendments serve the secular purpose of providing necessary governmental accommodation of religion. The Court "has long recognized that the government may (and sometimes must) accommodate religious practices."³³⁹ The Court

334. See *supra* note 330 and accompanying text (providing one of the reasons why Congress exempted Church-certified sanatoria in 1965).

335. See *supra* note 31 and accompanying text. These statutes provide that persons shall not be compelled to receive medical care contrary to their religious beliefs. Of course, this differs from a person rejecting available health care on religious grounds. Nonetheless, this does demonstrate that the Medicare and Medicaid programs do recognize the potential conflict between religions and the programs.

336. See *supra* note 56, 69 and accompanying text (providing examples of statutes and taxes that aid in the financing of the Medicare Part A program).

337. See *supra* notes 273, 252, 279 and accompanying text (explaining that in the context of generally available public benefits, only ensuring the availability of unemployment compensation has been held to implicate a compelling interest).

338. Indeed, there exist many important interests that fail to be "legally" compelling. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that the U.S. Constitution does not confer a fundamental right upon homosexuals to engage in sodomy).

339. *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-45 (1987) (explaining that if a state were to voluntarily accommodate individuals wishing not to work on their Sabbath, for religious reasons, such benefits would not violate the Establishment Clause).

has also recognized that legislation that "alleviate[s] significant governmental interference with the ability of religious organizations to define and carry out their religious missions" serves a permissible secular purpose.³⁴⁰ The amended Medicare and Medicaid statutes would enable individuals to benefit from these programs without compromising their religious beliefs. Without these amendments, elderly, blind and poor individuals who believe in spiritual therapy would be forced to violate their religious beliefs for the purpose of obtaining necessary nursing care, which itself has no religious qualities. The passage of the amendments would further Medicare and Medicaid's secular purpose of accommodating religious beliefs in order to provide necessary nursing care to individual of all religions.

Congress can better achieve Medicare and Medicaid's secular purposes by enacting exemptions for persons whose religious beliefs compel engaging in healing by spiritual means. More Medicare and Medicaid recipients would receive necessary nursing care. More recipients would receive their preferred medical treatment. Because of these secular purposes, the proposed amendments would pass *Lemon's* first prong.

B. The Proposed Amendments Would Neither Advance Nor Inhibit Religion

The proposed amendments to the Medicare and Medicaid statutes would also pass the second prong of the *Lemon* test.³⁴¹ This prong prohibits statutes that, as a primary effect, advance or inhibit religion.³⁴² The proposed amendments would not endorse or impermissibly prefer religion over nonreligion. Rather, the amendments would operate neutrally, ensuring the availability of publicly sponsored social welfare programs to eligible participants, regardless of religion. Individuals with no religion and individuals whose religion is indifferent towards medical care could continue to be reimbursed by Medicare and Medicaid, however, individuals

340. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987) (holding that such alleviations are a permissible secular legislative purpose pursuant to the first prong of the *Lemon* test regardless of the possibility that such abatements are not required under the Free Exercise Clause).

341. This prong reads, "its principle or primary effect must be one that neither advances nor inhibits religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (holding that the allocation of state funds to non-secular schools for secular subjects is unconstitutional due to excessive state entanglement in religious concerns).

342. See *supra* notes 132-159 and accompanying text (describing the Court's interpretation of the second prong of the *Lemon* test).

whose religion compels spiritual healing would also receive the same Medicare and Medicaid benefit of reimbursed physical nursing services expenses.

By providing to individuals who engage in spiritual therapy the same benefits provided to those individuals who do not engage in spiritual therapy the proposed amendments avoid advancing or inhibiting any religion. The Medicare and Medicaid amendments would reimburse only basic nursing and room and board expenses, but not expenses for actual spiritual treatment. This guarantees that the Medicare and Medicaid programs will be religious-neutral. The fact that these services may be offered in a sectarian environment does not reduce the religion neutral nature of providing basic nursing services to persons who require them. Any benefits received by religious institutions would only be applied towards the secular provision of room, board and nursing expenses. As in *Hunt*,³⁴³ because the government benefits would not advance the religious mission, the amended Medicare and Medicaid statutes would not violate the Establishment Clause.³⁴⁴

Any benefits that religious institutions may receive as a result of the enactment of the proposed statutes would be indirect and attenuated. The Medicare and Medicaid funding would not flow directly from the government to religious institutions that may ultimately accept the money.³⁴⁵ Rather, any money received by religious institutions would be the result of individual Medicare and Medicaid recipients deciding to seek treatment at those particular sanatoria. Because the Medicare and Medicaid funding would not be directly provided by the government to the sanatoria, but would arrive as a result of numerous private choices, "no imprimatur of state approval can be deemed to have been conferred on any particular religion, or on religion generally."³⁴⁶

Finally, "the mere identity of the party receiving government aid is not necessarily dispositive in determining whether a statute primarily advances religion."³⁴⁷ Undoubtedly, the proposed statu-

343. *Hunt v. McNair*, 413 U.S. 734 (1973). For a further discussion of *Hunt*, see *supra* notes 154-159 and accompanying text.

344. See *supra* notes 154-159 and accompanying text (describing the *Hunt* Court's interpretation of the *Lemon* test).

345. See generally *supra* notes 154-159. Although the government does transfer the money to these institutions, this is not considered to be "directly." In this context, directly means that the government decides which institutions will receive money and then gives money to those institutions accordingly.

346. *Mueller v. Allen*, 463 U.S. 388, 399 (1983) (citing *Widmar v. Vincent*, 454 U.S. 263, 274 (1981)).

347. *National Coalition for Pub. Educ. v. Harris*, 489 F. Supp 1248 (S.D.N.Y. 1980). The court's opinion demonstrates that in most circumstances where gov-

tory amendments to the Medicare and Medicaid programs would affect Christian Science sanatoria.³⁴⁸ However, because these amendments are nondenominational, this effect is of a permissible secondary or subordinate nature. Christian Scientists are not the only sect that practices spiritual healing.³⁴⁹ Even if Christian Scientists may be the only organized and practicing prayer healers, as the *Children's Healthcare v. Vladeck*³⁵⁰ court held, the inexistence of non-Christian Science spiritual or prayer healers cannot properly be assumed.³⁵¹ Thus, the proposed amendments to the Medicare and Medicaid statutes would not advance religion, the amendments would only advance the provision of necessary basic nursing services.³⁵²

ernment aid to religious institutions is found not to be the "primary effect" involves schools and colleges. *Id.* at 1258-65; see, e.g., *Meek v. Pittenger*, 421 U.S. 349 (1975) (upholding state tuition assistance to needy students who attend public and nonpublic colleges); *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (upholding state's practice of loaning public schools' textbooks to children in private schools); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (upholding the use of publicly supported school buses to transport children to parochial school).

Despite the fact that a large number of cases applying the *Lemon* test find no violation of the Establishment Clause in cases concerning private schools, nothing prevents courts from reaching similar conclusions for non-school cases. Furthermore, in *Marsa v. Wernik*, the court stated:

The essential question in terms of whether the religious or secular effect is primary would appear to be whether in relation to any other impact or effect of the governmental conduct, the religious effect is primary rather than secondary, dominant instead of subordinate, substantial as opposed to insubstantial, or direct as contrasted with indirect and remote.

86 N.J. 232, 249, 430 A.2d 888, 897-98 (N.J. 1981) (holding that the practice of a nondenominational meditation period at the beginning of the borough council meetings not a violation of the Establishment Clause). The *Marsa* court extrapolated from various Supreme Court decisions which are "relevant factors [and which] collectively fail to imprint the effect of a governmental practice with a primarily religious character," and thus do not violate the Establishment Clause. *Id.* at 251. These factors include the absence of and the differing degrees and relationships of the following:

(1) an avowed or express religious purpose, or (2) a religious or near-religious context, or a public school setting, or (3) an audience vulnerable to religious influences, such as school children, or (4) compulsory participation, as well as (5) the presence of an arguably secular tradition [which] may have served to enable the questioned practices to surmount First Amendment compunctions.

Id. Cf. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Zorach v. Clauson*, 343 U.S. 306 (1952).

348. See *supra* note 10 (estimating that Christian Science sanatoria receive between seven and ten million dollars of Medicare and Medicaid monies per year).

349. See *supra* note 290 (hinting at the existence of other religions that practice spiritual therapy).

350. 938 F. Supp. 1466 (D. Minn. 1996).

351. See *supra* notes 283-87.

352. See *supra* notes 312-13 (describing the proposed amendment's provision for physical nursing care).

C. *The Proposed Amendments Would Survive Lemon's Third Prong: Excessive Entanglement*

The proposed amendments would not foster excessive government entanglement with religion; thus, they would pass *Lemon's* third prong.³⁵³ The Court has employed a variety of interpretations of governmental entanglement.³⁵⁴ The most relevant interpretations include: does the statute result in "comprehensive, discriminatory and continuing state surveillance;"³⁵⁵ does the statute create "potential for political discordance" along political and religious lines;³⁵⁶ and does the statute delegate of share discretionary governmental powers with religion.³⁵⁷

The proposed Medicare and Medicaid amendments would not result in state surveillance or provide the government with direct control of any particular religious institution. Instead, the amended Medicare and Medicaid program would allow recipients to choose where they will receive their medical treatment, and the government would indiscriminately oblige the recipient's decision by reimbursing his or her medical care expenses.³⁵⁸ Of course, the government's exercise of its policing powers may result in some regulation of medical care providers, such as ensuring that the treatment provider meets the government's full disclosure requirements and does not act with fraud or deceit.³⁵⁹ However,

353. See *Lemon v. Kurtzman*, 403 U.S. 602, 634 (1971) (setting forth excessive government entanglement as the third prong of its test for violation of the Establishment Clause).

354. See *supra* Part III.B.3 and accompanying text (describing the third prong of the *Lemon* test).

355. *Mueller v. Allen*, 463 U.S. 388, 403 (1983) (citation omitted).

356. *Americans United for Separation of Church and State v. Bubb*, 379 F. Supp. 872, 894 (1974); see also *Lemon*, 403 U.S. at 623 (discussing the danger of "[p]olitical fragmentation and divisiveness on religious lines").

357. See *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 (1982) (discussing the consequences of governmental and religious entanglement).

358. See *supra* Part VI.

359. In the Medicare and Medicaid exemptions for Christian Science sanatoria, Congress addressed this inevitable result. See *Hearings on H.R. 6675*, *supra* note 26, at 697-707 (including a letter from Dr. J. Burroughs Stokes to Sen. Harry Byrd detailing the Church's pre-existing system of certification and listing, which Congress subsequently incorporated into the Medicare and Medicaid exemptions for Christian Science sanatoria). In order to avoid excessive entanglement, Congress allowed the Church to administrate its sanatoria and to regulate its nurses and practitioners by its method of certifying and listing. See, e.g., 42 U.S.C. § 1395x(e)(9) (exempting only sanatoria that are "operated, or listed and certified" by the Church). Both Congress and the Church recognized, however, that exempted sanatoria still must comply with public safety standards. See, e.g., *Hearings on H.R. 6675*, *supra* note 26, at 702 (stating that exempted Church sanatoria need not be licensed, "except insofar as a license may be required in compliance with fire, safety, and sanitation regulations"). The amended Medicare and Medi-

state surveillance would be eliminated because receiving Medicare and Medicaid benefits would remain voluntary, and each individual would decide where to obtain their treatment.

Additionally, the proposed amendments of the Medicare and Medicaid statutes would not result in political divisiveness along political and religious lines.³⁶⁰ The amendments would allow eligible persons who engage in spiritual healing to receive Medicare or Medicaid funding to cover the expenses of basic nursing care, room and board, but not for their spiritual treatment.³⁶¹ As no religion itself would receive the money this process would not promote any particular religion.³⁶² Nor must a recipient decide between religion or government, because both religious and nonreligious institutions would be reimbursed for the inpatients' necessary expenses.³⁶³ The proposed statutory amendments are both neutral among religions, as well as neutral between religion and state. Accordingly, the amendments would not promote political divisiveness split along lines of religious beliefs.

Furthermore, the proposed amendments would not delegate or share discretionary powers with religion.³⁶⁴ The amendments would neither grant governmental powers to any denomination nor allow the government to intrude into the affairs of any religion. No religion would have authority in place of the government's role in the regulation or provision of the Medicare and Medicaid programs. Participation in the programs would remain voluntary. The government would, however, accommodate persons who engage in spiritual healing.

The proposed amendments avoid the concerns of the Court in *Kiryas Joel*.³⁶⁵ The amendments extend a benefit to individuals

caid statutes would continue this practice of self-regulation, thereby avoiding administrative entanglement of the government with religion, but would still require spiritual therapy providers to comply with public safety statutes.

360. See *Lemon v. Kurtzman*, 403 U.S. 602, 622-23 (1971). This sub-prong of the *Lemon* test is designed to ensure that the government aid does not "fractionalize the electorate along religious lines . . . [or] promote political debate and division along religious lines." *Americans United*, 379 F. Supp. at 895.

361. See *supra* Part VI (detailing the proposed amendments to the Medicare and Medicaid statutes).

362. See *supra* notes 342-44 and accompanying text (examining the Court's analysis of *Lemon*'s "political divisiveness" test).

363. See *supra* note 320 and accompanying text.

364. See *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 (1982) (explaining that "important, discretionary governmental powers [should not] be delegated to or shared with religious institutions"); see also *supra* notes 176-83 (examining *Lemon*'s "delegation" test).

365. *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 691 (1994). *Kiryas Joel* further refined the entanglement prong by emphasizing the necessity of "an 'effective means of guaranteeing' that governmental power will

who engage in spiritual healing. However, the benefit of the government providing necessary medical care flows to a large number of nonreligious and other religious groups as well. The proposed amendments ensure that the Medicare and Medicaid statutes remain completely neutral, providing the same room, board and basic nursing care to all eligible recipients, regardless of religion.

Conclusion

The *Children's Healthcare v. Vladeck*³⁶⁶ court reached the correct decision. The Constitution does not allow for sect-specific statutes to provide benefits to only one religious denomination, such as the exemptions for Church-certified sanatoria. However, the absence of any Medicare and Medicaid exemptions for individuals whose religious beliefs compel them to engage in spiritual therapy, as a matter of public policy, is inexpedient. Adherants of spiritual healing, like all individuals, may require physical nursing care in a facility designed to provide such care. Receiving these services incurs much expense. The Medicare and Medicaid programs were designed to provide minimum health care such as necessary physical nursing care to individuals who cannot afford it. The importance in ensuring that all individuals receive basic nursing care equally applies to individuals who engage in spiritual healing. Public policy demands that these individuals should receive Medicare and Medicaid benefits to defray room, board and physical nursing care expenses. Congress should therefore amend the Social Security statutes to allow for persons whose religion compels engaging in healing by spiritual means to participate in the Medicare and Medicaid programs, and because such amendments would pass the *Lemon* test, they would be constitutional.

be and has been neutrally employed." *Id.* at 697 (quoting *Larkin*, 459 U.S. at 125). This ensures that the government will not selectively legislate favoritism to any particular religion.

366. 938 F. Supp. 1466 (D. Minn. 1996).

