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Donald L. Beschle

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*DONALD L. BESCHLE**

INTRODUCTION

SIMULTANEOUS developments in law and culture have focused attention on the use of religion as a factor in child custody disputes and adoption proceedings.[1] As presumptions such as the "tender years" doctrine[2] have been abandoned, they have been replaced by a determination of the best interests of the child, a more open-ended process that weighs the home environments offered by parents competing for custody. The continuing religious diversification of the United States and the rising incidence of religiously mixed marriage make it more likely that parents will have different attitudes toward religion. At the same time, heightened interest in the scope and effect of the religion clauses of the first amendment leads to questions about the propriety of courts considering religion in making custody and adoption decisions.

This Article assumes that the best interests test, whatever its defects, is likely to continue in most states as the basic framework for resolving child custody disputes and adoption proceedings.[3] The Article will not weigh the merits of a broad "best interests" test against alternatives that offer more certainty.[4] Instead, this Article will explore the constitutional

* Associate Professor of Law, The John Marshall Law School. B.A. 1973, Fordham; J.D. 1976, New York University; LL.M. 1983, Temple.

1. One of the earliest common-law cases in which a court determined custody of a child by examining the likely effect on the welfare of the child, rather than simply affirming the right of the father to control the child's upbringing, turned largely on the atheistic beliefs of the father, poet Percy Bysshe Shelley. *See* Shelley v. Westbrooke, 37 Eng. Rep. 850 (Ch. 1817).

2. The tender years doctrine is the "presumption that when the children were of 'tender years,' the mother, unless shown to be unfit, should be given preference over the father in the award of custody." Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. Fam. L. 423, 425 (1976-77).

3. Adoption proceedings are even more attuned to seeking the best interests of the child because adoption, unlike divorce, was unknown at common law, and thus unburdened with common-law precedent favoring paternal rights. *See* Huard, *The Laws of Adoption: Ancient and Modern*, 9 Vand. L. Rev. 743, 746 (1956).

4. There has been considerable debate in recent literature over whether a broad "best interests" test is actually preferable to a set of rules which would offer greater certainty. *See* Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 Law & Contemp. Probs. 226 (Summer 1975) (seminal criticism of a broad "best interests" test); *see also* Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 Mich. L. Rev. 477, 478 (1984) (arguing current best interests standard is both "too broad and too narrow to be acceptable," and suggesting legislatively created formal preference for primary caretakers instead); Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. Chi. L. Rev. 1, 11-28 (1987) (best

questions raised by the use of religion as a factor in these cases. May courts consider the presence of a religious environment in the home of a parent or prospective parent to be a positive factor without violating the first amendment prohibition of establishment of religion? To what extent may courts, at the request of a custodial parent, limit the religious activity of a non-custodial parent during visitation periods without compromising the first amendment's guarantee of free exercise? Are "matching statutes," under which some states attempt to place adopted children in homes having the same religious environment as that of the biological parents, constitutional? This Article considers such questions in light of both the jurisprudence of the religion clauses and the findings of social science concerning the relationship between religion and the welfare of individuals and society.

Parts I and II of this Article briefly explore the current state of the law of child custody and adoption and the current state of religion clause jurisprudence. Part III reviews the ways in which these two fields intersect. Part IV addresses whether the use of religion in these determinations can be justified by secular considerations, as required by the Constitution. Part V offers some conclusions on the constitutionality of current statutes and state court practices. This Article concludes that religion, defined in broad, non-traditional terms, is a permissible element in child custody and adoption proceedings.

It should be noted that the constitutional analyses required in custody disputes and adoption proceedings are very similar; in many instances, the considerations are identical. This Article will, therefore, analyze the constitutionality of the use of religion in custody disputes and then supplement the analysis with unique concerns raised by adoption proceedings.

I. BACKGROUND

A. *The Law of Child Custody*

The principle that child custody disputes should be resolved by a determination of the best interests of the child, and the related principle that such a determination is best made by careful examination of facts on a case-by-case basis, although now commonplace, are not ancient rules. At common law, the father's rights as head of the household included recognition as the "natural guardian of his child."[5] The mother, as a

interest of child should not be sole, main, or first and paramount consideration in child custody decisions); Fineman & Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 Wis. L. Rev. 107, 121 (best interest test is difficult to apply but should not "be discarded or interpreted out of existence").

5. Einhorn, *Child Custody in Historical Perspective: A Study of Changing Social Perceptions of Divorce and Child Custody in Anglo-American Law*, 4 Behav. Sci. & L. 119, 123 (1986) (quoting 3 W. Holdsworth, A History of English Law 511 (1973)). The rights of the "natural guardian" included choice of religion for the child. *See* Foster & Freed, *Life with Father*, 11 Fam. L.Q. 321, 322 (1978).

married woman, was considered a mere agent or ward of her husband, rather than an individual with rights of her own.[6] Although within a particular family a husband might give his wife power over the children, the law regarded the married woman as the equivalent of an infant.

The rule that guardianship was a right of the father arose in a society in which divorce was rare and available in practice only to the privileged.[7] Disputes over control of children rarely resembled a twentieth-century custody dispute. Some custody questions, however, did arise. For example, who was to control the children and their inheritances upon their father's death? The answer was not always the mother. The court might find that the interests of the father's estate were better protected by awarding guardianship to another relative.[8] The rule of paternal rights was in place when Anglo-American society moved, during the nineteenth century, closer to a permissive stance toward divorce.[9]

From the early nineteenth century to the early twentieth century, American custody law underwent significant change.[10] The rule that the father's right to custody was not absolute, but could be lost through some showing of unfitness, found its way into the law of most states.[11] Although the law retained a paternal preference, it sometimes could be overridden by the welfare of the child. Unfitness frequently was based on finding fault with the father's past and present behavior, rather than attempting to predict the child's future environment. Custody was often primarily a reward to the party not at fault in the divorce.[12]

In the late nineteenth century and the early twentieth, almost all

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6. *See* Einhorn, *supra* note 5, at 120-23.

7. Until well into the nineteenth century, divorce could be obtained in England and some American states only through a private bill of the legislature. *See* L. Friedman, A History of American Law 179-84 (1973); *see also* Einhorn, *supra* note 5, at 124 (in England, expensive appeal to Parliament through private bill required to be legally free to remarry). Einhorn quotes Holdsworth's quotation of a judicial pronouncement to a poor man convicted of bigamy, outlining the proceedings he should have taken to secure a bill of divorce and ending with a flourish worthy of Voltaire: "It is quite true that these proceedings would have cost you many hundreds of pounds, whereas you probably have not as many pence. But the law knows no distinction between rich and poor." *Id.* at 124-25 (quoting 1 W. Holdsworth, A History of English Law 623-24 (1971)).

8. *See* Einhorn, *supra* note 5, at 123 (choice of guardian dependent on nature of property inherited).

9. *See* Friedman, *supra* note 7, at 179-84; Mangrum, *Exclusive Reliance on Best Interest May Be Unconstitutional: Religion as a Factor in Child Custody Cases*, 15 Creighton L. Rev. 25, 30-44 (1981).

10. "The conflicting assumptions of 'father's natural rights' and 'tender years' appear to be running neck and neck toward the end of the nineteenth century. . . . [A]s late as 1899 legal textbooks recognized the father as the child's natural guardian . . . ." Einhorn, *supra* note 5, at 127.

11. Courts, at times, found that unfitness for guardianship could be based upon the blameworthy conduct, usually adultery, that created grounds for the divorce. *See id.* at 126.

12. *See id.* at 125-26. Under a fault-based system, "given the [nineteenth century] social convention that the wife filed for divorce, courts no doubt awarded custody to the mother more frequently than to the father." Mnookin, *supra* note 4, at 234-35.

courts moved swiftly from a rebuttable presumption in favor of paternal custody toward a strong presumption of maternal custody.[13] Courts justified application of the tender years doctrine by citing its supposed relation to the best interests of the child, and by assuming that the mother was, by virtue of her sex and maternal bond, uniquely able to provide the love and nurturing essential to a young child.[14] The presumption was consistent with late nineteenth-century attitudes toward women, which idealized their domestic role, but which did so by affirming unique feminine traits that reinforced the wall between the domestic domain of women and the outside world, governed by men. Thus, while the law held women unsuited for the professions[15] and while women's suffrage was an issue of intense controversy, courts recognized that "[m]other love is a dominant trait in even the weakest of women, and as a general thing, surpasses the paternal affection for the common offspring, and moreover, a child needs a mother's care even more than a father's."[16]

Although some courts during the era of paternal preference spoke of grounding the rule in the best interests of the child, the dominant justification was the natural rights or authority of the father as head of the household.[17] Conversely, while some courts during the era of the tender years presumption spoke in terms of the mother's rights, the dominant rationale was the perceived interests of the child.[18] This shift of viewpoint proved as significant as the shift in the results of custody and adoption proceedings in bringing on the next stage in the evolution of rules concerning custody.

If the maternal preference was explicitly grounded in the best interests of the child rather than the right of the mother, then it could be defeated by a showing that the superiority of maternal love, in the individual case or in general, was not supported by facts. Over the last two decades, the

13. *See* Einhorn, *supra* note 5, at 128-30. This was particularly true where children under eight were concerned. *See id.* The age of seven was the cut-off point of the presumption in the British statute of 1839 which served as a pattern for American legislatures and courts. *See* Roth, *supra* note 2, at 429. As Roth points out, a presumption in favor of the mother was often forged by courts rather than by the explicit direction of legislation. *See id.* at 432-38. This maternal presumption where young children were involved is the result of the tender years doctrine. *See supra* note 2 and accompanying text.

14. *See* Einhorn, *supra* note 5, at 128-30.

15. *See* Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (permitting a state to deny women the right to practice law because the "timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life"). This view lasted in some courts well into the twentieth century. *See* Goesaert v. Cleary, 335 U.S. 464, 466 (1948) (state could prohibit women from working as bartenders), *overruled*, 429 U.S. 210 (1976).

16. Freeland v. Freeland, 92 Wash. 482, 483, 159 P. 698, 699 (1916).

17. *See* Roth, *supra* note 2, at 425-28.

18. *See id.* at 425-38. While the welfare of the child was a consideration that might dilute the rule of paternal rights, it was seen as the *reason* for recognizing a maternal preference. Still, some courts did speak in terms of maternal rights. *See* Einhorn, *supra* note 5, at 128-30.

women's movement has made great strides in establishing the principle that the presence of individual talents and qualities should be measured directly, rather than assumed on the basis of gender. In short, society and in particular the law should rely on specific facts rather than stereotypes.[19] At the same time, a proliferation of writing in psychology and the social sciences has attempted to isolate specific characteristics conducive to successful child rearing and to debunk the notion that these are the inevitable, gender-based attributes of maternal love.[20]

Starting in the 1970s, the best interests of the child emerged, not as a rationale for use of the tender years doctrine, but as the dominant rule of decision in custody cases. A number of states explicitly repudiated any maternal preference;[21] indeed, some question was raised as to the constitutional validity of gender-based presumptions.[22] The absence of a gender-based presumption has made custody determinations less predictable.[23] The most obvious alternative to such presumptions, a rule requiring individualized inquiry into the best interests of each child, on its face satisfies the impulse to seek a system of perfect justice or utility, but may be unworkable.[24] In addition, the absence of specific standards

19. *Compare* Bradwell v. Illinois, 83 U.S. 130, 141 (1873) (Bradley, J., concurring) (characteristics of female sex, including timidity and delicacy, render females unsuitable for many occupations of civil life) *and* Goesaert v. Cleary, 335 U.S. 464, 466 (1948) ("The fact that women may now have achieved the virtues that men have long claimed as their prerogatives . . . does not preclude the States from drawing a sharp line between the sexes . . . ."), *overruled*, 429 U.S. 210 (1976) *with* Craig v. Boren, 429 U.S. 190, 197 (1976) ("classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives") *and* Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (invalidating stereotyped distinctions that were "rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage") *and* Reed v. Reed, 404 U.S. 71, 76 (1971) ("To give a mandatory preference to members of either sex over the members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause . . . .").

20. Social science findings concerning the question of whether women should be favored as custodians because they are women, or whether other traits, not invariably linked to gender, better indicate the ability to provide for a child's needs are reviewed by Professor Chambers. *See* Chambers, *supra* note 4, at 503-41.

21. *See* Foster & Freed, *supra* note 5, at 332-34, 343-63.

22. *See* Watts v. Watts, 77 Misc. 2d 178, 182-83, 350 N.Y.S.2d 285, 291 (Fam. Ct. 1973) (de facto maternal preference violates equal protection clause of fourteenth amendment). *But see* Gordon v. Gordon, 577 P.2d 1271 (Okla.) (statutory maternal preference upheld), *cert. denied*, 439 U.S. 863 (1978). The constitutional question is further muddled by the fact that a number of states have added Equal Rights Amendments to their state constitutions, presumably making gender distinctions even more difficult to sustain. *See* People *ex rel.* Irby v. Dubois, 41 Ill. App. 3d 609, 613-14, 354 N.E.2d 562, 566 (1976) (maternal presumption abandoned in light of state ERA). *But see* Cox v. Cox, 532 P.2d 994 (Utah 1975) (state ERA did not invalidate maternal preference).

23. Some commentators have found that the absence of gender based preferences "raises fundamental questions of fairness . . . and involves the use of the judicial process in a way that is quite uncharacteristic of traditional adjudication." Mnookin, *supra* note 4, at 292; *see also* Elster, *supra* note 4, at 12-16 (unjust decisions likely to occur).

24. *See* Elster, *supra* note 4, at 11; Mnookin, *supra* note 4, at 262-63.

will make the process seem arbitrary.[25] Confidence that similar cases will be treated similarly may be the fundamental element of a citizen's sense of justice.

Another approach is to enact legislation to supply gender-neutral standards for determining the best interests of children. Statutes may direct courts to examine the emotional ties between parent and child,[26] the physical and mental health of each parent,[27] the capacity of each parent to provide the child's material needs,[28] the expressed preferences of the child,[29] or other factors.[30] These attempts to specify guidelines, however, still leave great leeway for discretion, especially in light of the failure of these statutes to make clear the relative importance of each factor.[31] Nevertheless, an explicit statement of proper factors for judicial consideration says something about the community's view of the role of parents which, even if misguided, provides a starting point for discussion and criticism.

Discussion and criticism of a broad best interests test has been plentiful. One approach has been to seek a single, gender-neutral standard to substitute for the broad analysis of multiple factors. In their enormously influential book, *Beyond the Best Interests of the Child*,[32] Goldstein, Freud and Solnit stressed the importance of a sense of stability in a child's upbringing. This has been taken to support a rule that would create a strong presumption of custody in the "primary caretaker."[33]

25. The more fact-specific a decision is, the less reliable is the assessment that any particular case is truly similar to any other. At some point, the degree of individuation of each decision gives the process a decidedly ad hoc character. *See* Mnookin, *supra* note 4, at 253-56.

26. *See, e.g.*, Uniform Marriage and Divorce Act § 402 (revised 1982) ("The court shall consider all relevant factors including . . . (3) the interaction and interrelationship of the child with his parent or parents . . . .").

27. *Id.* § 402(5).

28. *See, e.g.*, Mich. Comp. Laws Ann. § 722.23(3)(c) (1968 & Supp. 1989) (requiring court to consider, among other factors, "[t]he capacity . . . to provide the child with food, clothing, medical care . . . and other material needs").

29. *See, e.g.*, Ill. Rev. Stat. ch. 40 § 602(a)(2) (revised 1989) (court shall consider all relevant factors including "the wishes of the child as to his custodian").

30. *See, e.g.*, Mo. Ann. Stat. § 452.375(2) (Supp. 1990) (including as factors "[t]he child's adjustment to his home, school, and community; . . . any history of abuse of any individuals involved; . . . [t]he intention of either parent to relocate his residence outside the state; and . . . [w]hich parent is more likely to allow the child frequent and meaningful contact with the other parent"). On the other hand, some statutes simply refer to the best interests of the child in broad terms, leaving the details to be decided by the courts. *See, e.g.*, Tex. Fam. Code Ann. § 14.07(b) (1986) (in best interests analysis, courts are only guided by parents' circumstances).

31. *See, e.g.*, Mo. Ann. Stat. § 452.375 (Supp. 1990) (statute requires consideration of all relevant factors without suggesting some factors may be more important than others); Mich. Comp. Laws Ann. § 722.23(3)(c) (1968 & Supp. 1989) (statute doesn't specify relative weights for each factor).

32. J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child (1973).

33. In one case, the court set forth a preference for the "primary caretaker," and a list of specific factors to determine which parent has that role. The list includes questions of who plans and prepares meals, who cleans and purchases the child's clothes, who puts the

Others have advocated a return to a presumption of maternal custody.[34] There has been serious consideration of the virtue of random assignment of custody in cases in which neither party is unfit and the two cannot agree.[35]

An alternative to the best interests inquiry has been the recent surge in attention focused on joint custody arrangements. Within a remarkably short time, more than half of the states have enacted legislation to permit, encourage or compel joint custody.[36] Joint custody arrangements give both divorcing parents the right to participate in major decisions affecting the child's upbringing. Some jurisdictions go further, providing for the child to maintain a residence or "home" with each parent.[37] In its idealized form, joint custody avoids the problems inherent in custody decisions by making such decisions unnecessary. While the parents' marriage has ended, divorce has not changed their status as parents. Joint custody has been scrutinized in legal and social science literature in recent years. The initial enthusiasm, however, has waned somewhat. It appears that joint custody may be desirable if the parents agree to it voluntarily and can be expected to carry out the agreement in a genuinely tolerant, non-hostile way.[38] In short, it may be valuable as an option, but detrimental as a rule.

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child to bed and wakes the child in the morning. *See* Garska v. McCoy, 167 W. Va. 59, 68-71, 278 S.E.2d 357, 362-64 (1981). However, some of these factors may not be good indicators of the emotional closeness of parent and child. *See* Chambers, *supra* note 4, at 538.

34. *See* Klaff, *The Tender Years Doctrine: A Defense*, 70 Cal. L. Rev. 335 (1982). Klaff argues that movement away from the tender years presumption is an unwise regression that would elevate parents' interests over those of children. He also notes that " 'mother' . . . is an extremely accurate proxy for 'primary caregiving parent'." *Id.* at 369.

35. *See* J. Goldstein, A. Freud & A. Solnit, *supra* note 32, at 153. Mnookin is almost certainly correct when he states that a random assignment or "coin toss" type of system would be regarded as offensive by most people. *See* Mnookin, *supra* note 4, at 290-91. *But see* Elster, *supra* note 4, at 40-43 (discussion of virtues of coin toss system).

36. "About thirty states now have joint custody laws . . . ." Freed & Walker, *Family Law in the Fifty States: An Overview*, 21 Fam. L. Q. 417, 523 (1988). Almost every state considered joint custody in a remarkably short period of time starting in the late 1970s. *See* Schulman & Pitt, *Second Thoughts on Joint Child Custody: Analysis of Legislation and its Implications for Women and Children*, 12 Golden Gate U.L. Rev. 539, 539 (1982). Schulman and Pitt describe the significantly different types of statutes that exist, some creating joint custody only as an option, others declaring some sort of preference for such an arrangement. *See id.* at 545-70.

37. *See* Chambers, *supra* note 4, at 549-50. Joint physical custody, however, is found only in about 2 percent of cases. *See id.* at 549 n.276 ("Joint physical custody is far less common than joint legal custody.").

38. *See* Twiford, *Joint Custody: A Blind Leap of Faith?*, 4 Behav. Sci. & L. 157, 167 (1986). It appears that the families in which joint custody works well are not the norm. *See* McKinnon & Wallerstein, *Joint Custody and the Preschool Child*, 4 Behav. Sci. & L. 169 (1986); *see also* Chambers, *supra* note 4, at 550-58 (reviewing the social science data on joint custody through 1983).

B. *The Religion Clauses of the First Amendment*

Before discussing the application of the religion clauses of the first amendment to custody or adoption of children, this Article will outline the approaches taken by courts faced with disputes involving religion clause claims, some of the unresolved difficulties in the area and some alternative approaches that have attracted attention. These alternatives encourage less formal application of existing standards. Recent free exercise clause cases also indicate movement away from a strict application of existing standards to a less precise balancing of interests.

1. The Establishment Clause

The first clause of the first amendment that discusses religion provides that "Congress shall make no law respecting an establishment of religion."[39] The 1947 case of *Everson v. Board of Education*[40] is recognized as the starting point of modern analysis of the establishment clause. In *Everson*, a sharply divided court sustained a New Jersey statute that provided for the reimbursement of parents for the cost of transporting their children to parochial schools.[41] All the justices agreed, however, that the goal of the establishment clause was to maintain a strict separation between church and state. Justice Black, writing for the Court and describing the effect of the clause, quoted Jefferson's conception of the clause as creating a "wall of separation between church and state."[42] The paradox of *Everson* is obvious. Although the "wall of separation" is described in nearly absolute language, the Court ruled against the establishment clause claim. The "wall" may be a stirring metaphor, but of questionable

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39. U.S. Const. amend. I.

40. 330 U.S. 1 (1947).

41. *See id.* at 17-18.

42. T. Jefferson, *Reply to a Committee of the Danbury Baptist Association*, in 8 The Writings of Thomas Jefferson 113 (H.A. Washington ed. 1854).

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

Everson, 330 U.S. at 15-16 (quoting Reynolds v. U.S., 98 U.S. 145, 164 (1878)) (citation omitted) (emphasis in original). Justice Black, writing for the Court, found that the wall had not been breached, but that the program merely acted to ensure that the same secular services were available to all. "State power is no more to be used so as to handicap religions than it is to favor them." *Id.* at 18.

value as a legal standard.[43] Not until the 1960s did the Court attempt to construct a specific test for establishment clause claims.

In *Abington School District v. Schempp*,[44] the Court held that requiring Bible reading as a devotional exercise in public schools was unconstitutional because the practice did not satisfy a two-part test:

> [W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[45]

The two-part test was found inadequate to resolve the question presented to the Court in *Lemon v. Kurtzman*, a 1971 case.[46] Rhode Island enacted a statute providing a 15 percent salary supplement to state-certified private school teachers. In order to ensure that the program had a secular "primary effect," the grants were limited to teachers of secular subjects who used only secular materials.[47] The program failed to satisfy the establishment clause because of the very steps the legislature had taken to ensure compliance with the second part of the *Schempp* test.

The Court drew on *Walz v. Tax Commission*,[48] which upheld state tax exemptions for religious property and other property devoted to nonprofit or charitable purposes, to highlight the constitutional aversion to "entanglement" of church and state.[49] In *Lemon*, the Court found that, however well-intentioned, any effort to ensure that state-subsidized teachers did not inject religion into secular courses would require "comprehensive, discriminating, and continuing state surveillance."[50] The three-part test enunciated in *Lemon* has become the standard by which government programs facing challenge on establishment clause grounds

43. The *Everson* dissenters make this point in their disparagement of Justice Black's wall as "[n]either so high nor so impregnable" as the wall intended by Jefferson. *See id.* at 29 (Rutledge, J., dissenting).

44. 374 U.S. 203 (1963).

45. *Id.* at 222. The Court, in citing *Everson*, stressed not the "wall of separation" metaphor but the principle of "neutrality." *Id.* at 218-19.

46. 403 U.S. 602 (1971).

47. Grants were restricted to teachers of subjects taught in public schools. Teachers had to be state certified and, with the supplement included, a teacher's salary could not exceed the maximum paid to public school teachers. *See id.* at 607-08. The case also invalidated a similar Pennsylvania statute, which reimbursed schools' actual expenses for instruction in mathematics, modern foreign languages, physical science and physical education. *See id.* at 609-10, 625.

48. 397 U.S. 664 (1970).

49. Taxation of church property might involve, noted the Court, assessment of the property, resolution of the question of what activities were purely religious and which were charitable but secular, and a possible foreclosure proceeding against church property in case of nonpayment. *See id.* at 672-74. In upholding the tax exemption, the court noted that there is room for such benevolent neutrality between church and state. *See id.* at 669.

50. Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).

are measured. To avoid violation of the clause, the government action must (a) "have a secular legislative purpose"; (b) have a "principal or primary effect . . . that neither advances nor inhibits religion";[51] and (c) avoid "an excessive . . . entanglement with religion."[52]

2. The Free Exercise Clause

The other first amendment religion provision commands that "Congress shall make no law . . . prohibiting the free exercise [of religion]."[53] In an eighteenth-century environment of limited government activity, the mandate of this clause might seem entirely consistent with that of the establishment clause. But in a modern, activist state, the invocation of the free exercise clause to claim exemption from general rules of law will inevitably highlight the tension between it and the establishment clause. Can free exercise compel privileged treatment of religious believers and how, if at all, is that different from the benefits to religion prohibited by the establishment clause?[54]

Until the 1960s, there was little need to dwell on the tension between the religion clauses, because there was very little independent force to the free exercise clause. Cases rejecting Mormon claims of constitutionally-compelled exemption from anti-polygamy laws established the principle that the clause protected only belief and expression of belief, and not "actions which were in violation of social duties or subversive of good order."[55] This distinction between protected beliefs or expressions of belief and unprotected actions motivated by belief[56] made the free exercise clause largely a restatement, in religious terms, of the free speech clause. When religiously-motivated parties successfully claimed constitutional exemption from statutes of general application, they prevailed on grounds that could be supported by the speech clause alone.[57]

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51. *Id.* at 612-13.

52. *Id.* (quoting Walz v. Tax Commission, 397 U.S. 664, 674 (1970)).

53. U.S. Const. amend. I.

54. *See, e.g.*, Thornton v. Caldor, 472 U.S. 703, 710 (1985) (Connecticut statute giving employees absolute right to refuse employer's demands to work on employees' Sabbath violated establishment clause, despite state's argument that it was an accommodation of employees' free exercise rights); Widmar v. Vincent, 454 U.S. 263, 270, 276 (1981) (state university must allow religious student groups equal access to campus facilities, despite university's claim that such access would violate establishment clause).

55. Reynolds v. United States, 98 U.S. 145, 164 (1878).

56. In Braunfeld v. Brown, 366 U.S. 599 (1961), the Court upheld the constitutionality of Pennsylvania's Sunday closing law, and reaffirmed the distinction between impermissible state regulation of belief and purely religious practices and permissible state regulation of "secular activity." *Id.* at 605-06.

57. Several cases involved Jehovah's Witnesses. In Cantwell v. Connecticut, 310 U.S. 296 (1940), the Court overturned a breach of the peace conviction against proselytizing Witnesses in the absence of evidence of a "clear and present menace to public peace and order." *Id.* at 311. In West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), the Court struck down a requirement that all children, including Jehovah's Witnesses who objected on religious grounds, recite the pledge of allegiance at the start of the school day. *See id.* at 642. *But see* Murdock v. Pennsylvania, 319 U.S. 105, 117 (1943)

In 1963, however, the Court extended the protection of the free exercise clause beyond belief and expression to action.[58] It held unconstitutional, as applied to a Sabbatarian, a state's requirement that a recipient of unemployment benefits be willing to accept jobs requiring Saturday work to be eligible for compensation.[59] The Court found that when a statute caused "substantial" interference with the practice of religion, the state had to show that universal application of the statute was necessary to protect a "compelling state interest."[60]

It might be argued that a Saturday work requirement was constitutionally flawed only because it did not burden Sunday worshippers as well. In *Wisconsin v. Yoder*,[61] however, the Court found that a neutral statute was subject to the new free exercise clause test. Members of the Old Order Amish challenged a Wisconsin requirement that all children attend school until they reach the age of sixteen. Because Old Order Amish believe "that salvation requires life in a church community separate and apart from the world and worldly influence,"[62] they reject formal education beyond the eighth grade. They argued that such education would teach values inconsistent with the Amish faith and remove children from their community during "the crucial and formative adolescent period."[63]

Applying the strict scrutiny test, the Court found that the requirement of high school attendance was a substantial burden on Amish religious practice.[64] History, found the Court, had demonstrated the effectiveness of the Amish approach to education in preparing its adolescents for adulthood within the Amish community. Because preparation for effective adult roles is the asserted state interest in compulsory education, the Court held that Wisconsin could not justify insistence upon its type of education over another that had also proven itself.[65] The Court also found that the state had failed to establish a compelling interest in requiring one or two years of education beyond eighth grade for Amish children.

(striking down tax on distribution of religious literature, giving religious literature preferred position, other literature being taxable despite first amendment speech and press protections).

58. *See* Sherbert v. Verner, 374 U.S. 398 (1963).

59. *See id.* at 410.

60. *See id.* at 403, 406-07.

61. 406 U.S. 205 (1972).

62. *Id.* at 210.

63. *Id.* at 211.

> The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing; a life of "goodness," rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.

Id.

64. *See id.* at 217-18.

65. *See id.* at 221-25.

Yoder was the high point of deference to free exercise clause claims. As discussed below, the Supreme Court's recent free exercise decisions seem to indicate a drift toward a balancing test that gives great weight to articulated government interests. Still, the language of the *Yoder* test remains. When claimants establish that a government practice substantially burdens their practice of religion, government must demonstrate that the practice is necessary to protect a compelling state interest.

3. The Articulated Religion Clause Tests—Problems and Alternatives

The presence of articulable tests for analysis of establishment clause and free exercise clause cases has not produced predictability in religion clause cases. Despite a barrage of criticism, the Supreme Court has stood by the language of its prior opinions.[66] The Court's decisions, however, indicate that some proposed alternatives may be having an effect.[67] The *Lemon* test has created a cottage industry in critical commentary. Separationists find the test too loose in its acceptance of plausible secular state purposes[68] and too pliable in its quest for a primary secular effect.[69] Accommodationists point to the "Catch-22" nature of the entanglement clause as an obstacle to conscientious legislative attempts to satisfy the "effects" test.[70] The Court itself has indicated discomfort with the

66. *See* Edwards v. Aguillard, 482 U.S. 578, 581-85 (1987) (commencing its analysis of statute requiring schools to teach "creation science" by reciting *Lemon* criteria); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (Court cited extensively to *Sherbert* and *Yoder* in analyzing free exercise claim factually similar to *Sherbert*).

67. The following is a list of the more prominent suggested alternatives to *Lemon*: (i) a test that makes the presence or absence of coercion determinative, *see* McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933, 940 (1986) (suggesting that Court's three-part test be modified to forbid government action that coerces religious belief and behavior); *see also* County of Allegheny v. ACLU, 109 S. Ct. 3086, 3135 (1989) (opinion of Kennedy, J.) (finding a creche display in violation of establishment clause "border[s] on latent hostility toward religion . . . ."); (ii) a test in which the core question is whether a statute or practice explicitly singles out religion for special treatment, *see* Kurland, *Of Church and State and the Supreme Court*, 29 U. Chi. L. Rev. 1, 96 (1961) (democratic society cannot survive without equality and certainty as fundamental objectives in our legal system); (iii) a test that uses a broad balancing approach, *see* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development—Part II: The Nonestablishment Principle*, 81 Harv. L. Rev. 513, 513-16 (1968) (suggesting "refinement" of existing tests in pursuance of "political neutrality"); and (iv) Professor Choper's two-part test that would uphold a government practice unless it lacks a legitimate secular purpose *and* (rather than *or*, as in *Lemon*) is likely to compromise, coerce or influence religious beliefs. *See* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673, 675 (1980) (suggesting same principle should be used to resolve establishment and free exercise clause conflicts). As intriguing as these suggestions are, with the possible exception of coercion, now endorsed by Justice Kennedy, they show little sign of displacing *Lemon*.

68. *See* Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on* Lynch v. Donnelly, 1984 Duke L.J. 770, 784.

69. *See id.* Generally, the Supreme Court has been far more likely to find the absence of a primary secular effect than the absence of a secular purpose. *See* L. Tribe, American Constitutional Law § 14-10, at 1214-1216 (2d ed. 1988).

70. *See* Aguilar v. Felton, 473 U.S. 402, 420 (1985) (Rehnquist, J., dissenting). Jus-

Lemon framework, hinting that it is only a tool for analysis, not an invariable rule.[71] Such language tends to appear in those cases where the outcome seems most clearly in conflict with what *Lemon* would command.[72] Yet the test survives, perhaps more out of dissatisfaction or disagreement about alternatives than positive enthusiasm for it.[73]

While not renouncing *Lemon*, Justice O'Connor has recently suggested a clarification of establishment clause analysis.[74] In her view, the establishment clause prohibits two types of government actions. "One is excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines."[75] This adds little to *Lemon*'s insights. The second goal, which has attracted much more attention, is to prohibit "government endorsement or disapproval of religion."[76] Justice O'Connor's focus is on the message communicated by the government action in question and whether the action is likely to make nonadherents of religious doctrine reasonably feel disfavored because of their views and excluded from what they perceive to be a religiously committed community.[77] While this test has been criticized,[78] many have welcomed it as a promising alternative to *Lemon*.[79]

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tice O'Connor has also criticized the use of "non-entanglement" as a separate requirement. *See id.* at 430 (O'Connor, J., dissenting).

71. *See* Lynch v. Donnelly, 465 U.S. 668, 679 (1984); Mueller v. Allen, 463 U.S. 388, 394 (1983).

72. *See supra* note 71 and accompanying text; *see also* Marsh v. Chambers, 463 U.S. 783, 795 (1983) (Court upheld use of paid legislative chaplains by Nebraska legislature without any overt reference to *Lemon* test).

73. Justice Powell endorses the test as "the only coherent test a majority of the Court has ever adopted." Wallace v. Jaffree, 472 U.S. 38, 63 (1985) (Powell, J., concurring).

74. *See Lynch*, 465 U.S. at 687-89 (O'Connor, J., concurring); *see also Jaffree*, 472 U.S. at 69-70 (O'Connor, J., concurring) (government may consider religion when making law and policy, but is precluded from favoring one particular religion).

75. *Lynch*, 465 U.S. at 687-88.

76. *See id.* at 688.

77. *See id.* "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." *Id.* Professor Suzanna Sherry sees this "strikingly unique vision of the harms that the establishment clause is intended to prevent," this concern with the importance of a sense of belonging to the community, as a distinctly feminine perspective. *See* Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 Va. L. Rev. 543, 593-595 (1986).

78. *See* Smith, *Symbols, Perceptions and Doctrinal Illusions: Establishment Neutrality and the 'No Endorsement' Test*, 86 Mich. L. Rev. 266, 269 (1987).

79. *See, e.g.*, Dellinger, *The Sound of Silence: An Epistle on Prayer and the Constitution*, 95 Yale L.J. 1631, 1638 (1986) (applying Justice O'Connor's "promising approach" to conclude that moment of silence law does not constitute legislative endorsement of religion); Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C.L. Rev. 1049, 1051 (1986) (commending Justice O'Connor's endorsement test and arguing that "its serious implementation will require rethinking some of our most firmly entrenched

Similarly, the free exercise clause test has been criticized and alternatives have been suggested.[80] Several recent decisions of the Supreme Court are difficult to reconcile with the strict scrutiny approach of *Yoder*. In the Court's willingness to accept some matters of arguable gravity[81] as compelling interests, and in its failure to insist on the use of less restrictive alternatives,[82] the Court may well be using a flexible balancing approach under the guise of strict scrutiny. This is potentially dangerous, however, because such balancing almost surely calls for an assessment of the importance to claimants of various religious practices.[83] Such assessments evoke images of courts assigning values to thoughts and acts that they have no business either promoting or belittling.

II. RELIGION AS A FACTOR IN CHILD CUSTODY AND ADOPTION: CURRENT LAW

The use of religion as a factor in child custody disputes is as old as the best interests test itself. The case generally cited as the leading English precedent supporting the proposition that the presumption of paternal custody could be overridden by evidence of unfitness used atheism as proof of that unfitness.[84] In the United States, child custody and adoption proceedings are a matter of state law. A survey of current law in the

practices"); Tribe, *Seven Deadly Sins of Straining the Constitution Through a Pseudo-Scientific Sieve*, 36 Hastings L.J. 155, 162 (1984) ("Justice O'Connor at least asked the right question in *Lynch*."); Note, *Permissible Accommodations of Religion: Reconsidering the New York Get Statute*, 96 Yale L.J. 1147, 1160 (1987) (Justice O'Connor's approach "provides a standard capable of consistent application and avoids the criticism levelled against the *Lemon* test.").

80. *See generally* Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 Wm. & Mary L. Rev. 943, 948 (1986) (suggesting establishment clause analysis be applied to free exercise clause); Giannella, *Religious Liberty, NonEstablishment, and Doctrinal Development: Part I: The Religious Liberty Guarantee*, 80 Harv. L. Rev. 1381, 1386 (1967) (Court must adopt uniform concept of what is "religious" to ensure consistency in religion clause cases); Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 Minn. L. Rev. 545, 593-94 (1983) (equal treatment for expression of religious interests and free speech claims would eradicate establishment clause problems with free exercise clause test).

81. *See* Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (state interest in maintaining completely standardized military uniforms); Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 654 (1981) (state interest in confining fund solicitation activities at state fair to fixed locations).

82. *See Heffron*, 452 U.S. at 654; *see also* O'Lone v. Estate of Shabazz, 482 U.S. 342, 350 (1987) (prison work schedules need not accommodate Muslim prisoners who want to attend weekly religious services); *Goldman*, 475 U.S. at 509-10 (giving wide deference to decisions of military in establishing dress code).

83. In theory, courts are to avoid assigning their own values to religious practices, or the burdens placed on them. *See* Thomas v. Review Bd., 450 U.S. 707, 715 (1981). Clearly, however, such judicial evaluations do take place. *See* People v. Woody, 61 Cal. 2d 716, 725, 40 Cal. Rptr. 69, 76, 394 P.2d 813, 820 (1964) ("Polygamy, although a basic tenet in the theology of Mormonism, is not essential to the practice of the religion; peyote, on the other hand, is the *sine qua non* of defendants' faith.").

84. *See* Shelley v. Westbrooke, 37 Eng. Rep. 850, 851 (Ch. 1817) (atheism of father used as evidence of unfitness).

United States is facilitated by dividing the subject matter into several discrete questions.

A. *May Religion Be Considered in Determining the Best Interests of the Child?*

Only a few state statutes specify the factors to be considered as part of best interests determinations. Most of the states that do specify factors include permission to consider other factors.[85] As a result, the determination of the factors constituting best interests is usually a task for the courts. There is consensus among courts that "moral" factors are proper considerations,[86] and many courts also have explicitly endorsed consideration of the child's "spiritual" welfare.[87] In broad terms, then, religion is considered to be a proper subject of inquiry in custody disputes.

A number of states, however, have taken steps to limit the role of religion. For example, some courts say that religion may not be the sole or dominant factor in the determination.[88] Such statements, however, have raised as many questions as they have answered. If the statement means that religious factors may never outweigh more tangible factors, then apparently religion can be used only to bolster the same decision that would have been made without its consideration and would never tip the bal-

85. *See* Wyer, Gaylord & Grove, *The Legal Context of Child Custody Evaluations*, in Psychology and Child Custody Determinations 3, 10-14 (L. Weithorn ed. 1987); *supra* notes 26-31 and accompanying text.

86. *See, e.g.*, Hild v. Hild, 221 Md. 349, 353, 157 A.2d 442, 446 (1960) (listing factors to be considered in best interests analysis); *In re* Adoption of "E", 59 N.J. 36, 49, 279 A.2d 785, 792 (1971) (trial court should have considered moral factors when deciding best interests of child). Some statutes specifically refer to the moral fitness of the parents as a proper concern. *See, e.g.*, Ohio Rev. Code Ann. § 3109.04 (B)(1)(c) (Anderson 1989) (modification of custody appropriate where "present environment endangers significantly . . . moral . . . development"); Utah Code Ann. § 30-3-10(1) (1989) ("demonstrated moral standards"). But family law in general has recently become more reluctant to address issues in moral terms. *See* Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 Mich. L. Rev. 1803, 1806 (1985).

87. *See, e.g.*, Burnham v. Burnham, 208 Neb. 498, 502, 304 N.W.2d 58, 61 (1981) (court considers "not only the spiritual and temporal welfare" of child, but other factors as well); Dean v. Dean, 32 N.C. App. 482, 484-85, 232 S.E.2d 470, 471-72 (1977) (court's determination that parent's failure to take child to Sunday school affected child's spiritual welfare did not violate constitutional separation of church and state); Pruss v. Pruss, 236 Pa. Super. 247, 249, 344 A.2d 509, 510 (1975) ("[t]he best interests of [a child] are not limited to physical well-being, but include moral, intellectual, and *spiritual welfare*") (emphasis added). Two states specifically refer to "spiritual" interests in statutes. *See* Haw. Rev. Stat. § 571-46(5) (1985) (court may hear testimony relevant to a "determination of what is for the best physical, mental, moral, and spiritual well-being of the child"); S.C. Code Ann. § 20-3-160 (1976) (court may make "such orders touching . . . what . . . security shall be given for . . . the best spiritual as well as other interests of the children").

88. *See, e.g.*, Frank v. Frank, 26 Ill. App. 2d 16, 20, 167 N.E.2d 577, 580 (1960) (religion is significant but not exclusive factor in custody determinations); Anhalt v. Fesler, 6 Kan. App. 2d 921, 923, 636 P.2d 224, 226 (1981) (religion alone is not sufficient when considering best interests of children); Commonwealth *ex rel.* English v. English, 194 Pa. Super. 25, 26, 166 A.2d 92, 93 (1960) (religion is important but not determinative factor).

ance one way or the other.[89] Such an interpretation would make religion irrelevant. On the other hand, if the statement means only that some secular interests, in addition to religious interests, must support a custody award,[90] then it is scarcely a limitation on courts at all.

Other courts apply the more substantial limitation that religion may be considered only to the extent that it will have a clear bearing on the secular well-being of the child.[91] Thus, legitimate arguments might be made that religion or its absence will cause physical, emotional or social benefits or harm to the child.[92] Arguments resting on spiritual welfare alone, or labeling religion as per se beneficial are disallowed.[93] This rule may be applied with different levels of rigor. On the one hand, it may be said to preclude consideration of anything short of clear evidence of actual, evident harm.[94] On the other, it may permit prediction of secular effects as more or less likely.[95] In *Zucco v. Garrett*,[96] an Illinois court flatly stated that it was improper "to conclude that providing a religious environment is *per se* beneficial to a child's welfare. We believe . . . that the intrinsic benefits, if any, of an 'upbringing in religion' are beyond the

89. *See* Osier v. Osier, 410 A.2d 1027, 1029 (Me. 1980). A court should initially assess best interests without giving consideration to either parent's religious practices. A court should then go on to consider the impact of religion only where the practices of the parent preferred by the initial inquiry pose "an immediate and substantial threat to the child's well-being." *Id.* at 1031.

90. Except in clear cases such as child abuse, some secular argument can be made in support of either parent. For example, while the mother may be the primary caretaker, the father will normally have higher earnings at the time of divorce. *See* Chambers, *supra* note 4, at 527-41. This is somewhat analogous to the case which usually satisfies the "purpose" prong of the *Lemon* test. Except for extreme cases, some credible secular motive can be pointed to for almost all legislation. *See* L. Tribe, *supra* note 69, § 14-9, at 1204-06 (2d ed. 1988).

91. *See, e.g., In re* Marriage of Short, 698 P.2d 1310, 1311-12 (Colo. 1985) (court's neutrality on issue of parent's religion does not preclude it from hearing evidence of parent's religious practice that may cause physical or emotional harm to child); *Osier*, 410 A.2d at 1032 (in custody determination mother's religious practices should be considered only as they relate to child's well-being); *In re* Marriage of Hadeen, 27 Wash. App. 566, 579, 619 P.2d 374, 382 (1980) ("religious decisions and acts may be considered in a custody decision only to the extent that [they] will jeopardize the temporal mental health or physical safety of the child").

92. *See* Burnham v. Burnham, 208 Neb. 498, 502, 304 N.W.2d 58, 61 (1981).

93. *See* Gould v. Gould, 116 Wis. 2d 493, 503, 342 N.W.2d 426, 432 (1984).

94. In Quiner v. Quiner, 59 Cal. Rptr. 503 (Cal. Ct. App. 1967), evidence that the custodial mother was a member of a sect that taught strict separation between members and non-members and that would regard the child's father, a non-member, as "unclean" was held insufficient to determine a custody award. *See id.* at 516. "Although the evidence indicates a probability of psychological impact," the court would not act in the absence of an actual showing of harm. *Id.* at 518.

95. In Burnham v. Burnham, 208 Neb. 498, 304 N.W.2d 58 (1981), the court was willing to act on its view that the mother's adherence to the teachings of an ultra-conservative Catholic sect, which would require her to shun her daughter if she disobeyed church rules and teach racist views, would be likely to cause harm to the child. *See id.* at 503, 304 N.W.2d at 61-62.

96. 150 Ill. App. 3d 146, 501 N.E.2d 875 (1986).

power of a civil court to comprehend."[97] But a New York court, also purporting to focus on the secular welfare of the child, stated in *Robert O. v. Judy E.*[98] that "[r]eligion and morality are so closely interwoven in the lives of most people that it is difficult to say whether good moral character could be molded in a child without some religious training."[99] The test of secular well-being, then, may be interpreted in ways that seriously limit consideration of religion, or ways that hardly limit it at all.

A final significant distinction made by some courts is between children with "actual religious needs" and those without such needs. Under this view, a court determines whether the child has acquired religious preferences and whether a particular religion is part of the child's identity. If so, the relative ability of parents to tend to those needs is a proper consideration.[100] If not, then religion is irrelevant. This position also requires some elaboration. Does only a mature child have actual religious needs, or do they exist from the earliest stages of religious training?[101] Some courts have focused on the expressed wishes of the child,[102] others on the value of stability in all phases of the child's life.[103] How much weight is to be assigned to actual religious needs? One commentator has concluded that these preferences should be given no more weight than a child's preferences in other areas, even if the child is mature.[104] Is this so

97. *Id.* at 155, 501 N.E.2d at 880 (emphasis in original).

> The principle or primary effects of giving preference to parents who are active adherents of organized religion will be (1) to punish parents who do not believe in God or going to church . . . (2) to encourage non-religious, anti-religious, or simply disinterested parents to engage in religious practices even if their beliefs are not sincere, and (3) to increase the number of children raised in religious households.

Id. at 155-56, 501 N.E.2d at 881 (citation omitted).

98. 90 Misc. 2d 439, 395 N.Y.S.2d 351 (N.Y. Fam. Ct. 1977).

99. *Id.* at 441, 395 N.Y.S.2d at 352.

100. *See* Bonjour v. Bonjour, 592 P.2d 1233, 1239-40 (Alaska 1979); *In re* Vardinakis, 160 Misc. 13, 17-18, 289 N.Y.S. 355, 361 (N.Y.C. Dom. Rel. Ct. Ch. 1936); *see also* Note, *The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interest Equation*, 82 Mich. L. Rev. 1702, 1727-32, 1738 (1984) (distinction is put forward as important in resolving the constitutional problem).

101. *See* Ramsey, *The Legal Imputation of Religion to an Infant in Adoption Proceedings*, 34 N.Y.U. L. Rev. 649 (1959). Some courts have discounted the religious preferences of younger children. *See, e.g.*, Wojnarowicz v. Wojnarowicz, 48 N.J. Super. 349, 354, 137 A.2d 618, 621 (N.J. Super. Ct., Ch. 1958) (seven year-old too immature to choose religion); Schwarzman v. Schwarzman, 88 Misc. 2d 866, 874, 388 N.Y.S.2d 993, 999 (N.Y. Sup. Ct. 1976) (10 year-old too young to suffer imposition of choice of religion); Munoz v. Munoz, 79 Wash. 2d 810, 815, 489 P.2d 1133, 1136 (1971) (en banc) (six year-old too young to choose religion).

102. *See Bonjour*, 592 P.2d at 1240; *Vardinakis*, 160 Misc. at 18, 289 N.Y.S. at 361.

103. In Robert O. v. Judy E., 90 Misc. 2d 439, 395 N.Y.S.2d 351 (N.Y. Fam. Ct. 1977), the court, although recognizing that the nine year-old child would not be able to "choose for himself" until some time in the future, recognized the value of "allowing him the opportunity to *continue* in those religious services [to which] he has been introduced." *Id.* at 441-42, 395 N.Y.S.2d at 352 (emphasis in original).

104. "The first amendment's requirement of governmental neutrality toward religion will only be satisfied if courts treat religion-based preferences as they treat preferences based on other relevant considerations." Note, *supra* note 100, at 1729 n.97.

in light of the free exercise clause, which presumably also protects mature minors?[105]

B. *May Courts Weigh the Merits of Different Religions?*

The religious issue often arises in custody disputes in which both parents intend to give the child religious training, but where each adheres to a different religion. As the incidence of both divorce and interreligious marriage increases, such situations become more common.[106] The issue then becomes one of weighing the relative value of two self-described religions.[107]

The general rule in these cases is easy to state. If there is an undisputed core to the religion clauses it is that government may not prefer one religion to another;[108] courts uniformly refuse to weigh the relative merits of religions.[109] Occasionally, however, courts find that a religion, almost always a highly unconventional sect,[110] poses a clear threat to a

105. There are some instances in which courts recognize a minor's constitutional rights even when they conflict with rights of parental choice. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976). On the subject of the relationship between parents, children and state power, see Burt, *The Constitution of the Family*, 1979 Sup. Ct. Rev. 329. On the specific subject of minors and free exercise, see Note, *Adjudicating What* Yoder *Left Unresolved: Religious Rights for Minor Children After* Danforth *and* Carey, 126 U. Pa. L. Rev. 1135 (1978).

106. Although most American marriages are religiously homogeneous, the incidence of interfaith marriage appears to be increasing. The percentage of religiously heterogeneous marriage is substantially higher among younger couples. *See* Alston, McIntosh & Wright, *Extent of Interfaith Marriages Among White Americans*, 37 Soc. Analysis 261, 262-63 (1976). This is tempered by the fact that over time, most couples from different religions "eventually achieve . . . religious unity" through conversion of one or both spouses. *See* R. Wuthnow, The Restructuring of American Religion 90 (1988). Yet "[f]or every major denomination, a smaller proportion of married people are currently wedded to a spouse who has the same religion as theirs than was the case a few decades ago." *Id.*

107. The case law simply avoids the problem of defining religion, *see infra* notes 168-182 and accompanying text, by accepting conventional concepts of what a religion is and taking the parties' own classification of their beliefs at face value. All of the cases discussed in this analysis of whether courts may weigh the merits of different religions involve parents who adhere to groups that call themselves religious and that clearly fit that description in conventional usage.

108. Even the most cautious application of the establishment clause would require application of this principle. *See* Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) (establishment clause designed to prevent government preference of one religious denomination or sect over others).

109. *See, e.g.*, McLaughlin v. McLaughlin, 20 Conn. Supp. 278, 278, 132 A.2d 420, 422 (Conn. Super. Ct. 1957) (court rejected claim that children's welfare would improve with a change of custody and exposure to father's religion); Compton v. Gilmore, 98 Idaho 190, 195, 560 P.2d 861, 866 (1977) (court reversed part of order prohibiting father from providing religious training to his daughter); Goodman v. Goodman, 180 Neb. 83, 88-89, 141 N.W.2d 445, 448-49 (1966) (custodial parent's religious beliefs do not warrant change in custody absent showing of serious threat to child's health or well-being); Munoz v. Munoz, 79 Wash. 2d 810, 815-16, 489 P.2d 1133, 1136 (1971) (en banc) (reversing order prohibiting father from taking children to church).

110. One way to avoid the need to choose between religions would be to define a sect as something other than a religion, a route taken in other contexts involving some first

child's well being and decide a custody dispute on that basis. In *Burnham v. Burnham*,[111] the Nebraska Supreme Court found that a mother's adherence to the views of an ultra-conservative sect endangered the welfare of her daughter. Specifically, the mother believed that her daughter was illegitimate in the eyes of the church, that if her daughter disobeyed church rules she would be required to shun her and that, according to church teaching, " 'there exists in this world, a master plot on the part of the Jews and Communists, to gain control of the world.' "[112]

Burnham is unusual. Other courts on similar facts have tenaciously held to the principle of refusing to declare some religious beliefs inferior to others. In *Quiner v. Quiner*,[113] a California court rejected the contention that a mother's adherence to the beliefs of a sect that prohibited social contact with non-members, participation in civic or political activity, ownership of radios or televisions and giving toys to children was necessarily contrary to the child's best interests.[114] The court declared that it would act only upon concrete evidence of actual impairment of the child's well being.[115]

C. *May Courts Determine Which Parent Will Provide a Better Religious Upbringing, Regardless of Denomination?*

Religion may be a factor in custody cases even in the absence of a denominational split between parents. In such cases, courts have often attempted to determine which parent would provide the better religious atmosphere for the child. Evidence taken into account has ranged from relatively objective matters, such as only one parent living in a community that had religious facilities for the children to attend,[116] to more

amendment claims. *See generally* Africa v. Pennsylvania, 662 F.2d 1025, 1031-34 (3d Cir. 1981) (prisoner failed to show MOVE was protected as religion within first amendment because he could not show beliefs were sincere and religious in nature, rather than self-serving), *cert. denied*, 456 U.S. 908 (1982).

111. 208 Neb. 498, 304 N.W.2d 58 (1981).

112. *Id.* at 500, 304 N.W.2d at 60 (quoting letter written by defendant to her sister-in-law).

113. 59 Cal. Rptr. 503 (Cal. Ct. App. 1967).

114. The court enumerated the stern requirements of church membership. *See id.* at 508-09. Also significant was the fact that the mother would teach the child that the father, as a non-adherent to the faith, was "unclean." *Id.* at 513.

115. The court stated the following:

> Although the evidence indicates a probability of psychological impact, we doubt that we can . . . anticipate on the basis of psychiatric conclusion alone that a child's attitude toward his father will assume an inimicable or hostile complexion, or that his physical, emotional or mental health will be affected. . . . [I]f . . . it be shown that [the child's] physical, emotional and mental well-being has been affected and jeopardized . . . the courts of our state [will provide] ready access for relief.

Id. at 518.

116. *See* T. v. H., 102 N.J. Super. 38, 39, 245 A.2d 221, 221 (N.J. Super. Ct., Ch. 1968) (father lived in community near Jewish temples and Hebrew schools; mother, also Jewish, moved to town 80 miles from nearest temple), *aff'd*, 110 N.J. Super. 8, 264 A.2d 244 (N.J. Super. Ct., A.D. 1970).

subjective matters, such as the moral conduct of the parties. The Iowa Supreme Court, in *McNamara v. McNamara*,[117] in awarding custody to the father, emphasized the importance of its finding that he "conscientiously adheres to religious teachings and would apparently rear his children in the same manner."[118] Even though the court found that "both parents [were] about equally capable of caring for the children," the mother's adulterous behavior presumably tipped the scales in favor of paternal custody.[119]

Courts occasionally comment with favor on regular church attendance,[120] parental participation in church-related activities[121] and on their intentions that the children attend services, Sunday school or parochial school.[122] It should be noted, however, that more religious activity has not always been found to be better. In *Hilley v. Hilley*,[123] the Alabama Supreme Court held that a trial judge could consider evidence that the intense church involvement of an evangelist was having an adverse effect on her children.[124]

Extreme cases aside, courts have often attempted to resolve the question of which parent would provide a better religious environment, regardless of the parents' denominational differences. Courts have considered church attendance, involvement in church activities and a lifestyle consistent with church teachings.

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117. 181 N.W.2d 206 (Iowa 1970).

118. *Id.* at 209.

119. *See id.* at 209-10.

120. *See, e.g.*, Strickland v. Strickland, 285 Ala. 693, 695, 235 So. 2d 833, 835 (1970) (father attending church with son demonstrates father is excellent parent); Lewis v. Lewis, 217 Kan. 366, 370-71, 537 P.2d 204, 208 (1975) (father's church membership and taking children to church indicates children are well cared for); Welch v. Welch, 307 So. 2d 737, 739 (La. Ct. App. 1975) (father's taking children to church implies his fondness for them).

121. *See, e.g.*, Meyer v. Hackler, 219 La. 750, 753, 54 So. 2d 7, 10 (1951) ("the evidence preponderates that [the mother] bears an excellent reputation for morals, being a devoted worker in the church"); *In re* Custody of King, 11 N.C. App. 418, 419, 181 S.E.2d 221, 221 (1971) (mother's church participation is factor in mother's ability to care for child).

122. *See, e.g.*, Woodard v. Woodard, 46 Ala. App. 507, 509, 244 So. 2d 595, 597 (1971) (father's insistence that children attend church favorable factor in custody determination); Johnson v. Johnson, 536 S.W.2d 620, 621 (Tex. Civ. App. 1976) (same). In several cases, the courts approvingly commented that one parent maintained a "good Christian home," or words to that effect. *See, e.g.*, McCullough v. McCullough, 222 Ark. 390, 394, 260 S.W.2d 463, 465 (1953); Crowe v. Crowe, 116 Ind. App. 534, 541, 65 N.E.2d 645, 648 (1946); Hamm v. Hamm, 207 Kan. 431, 434, 485 P.2d 221, 224 (1971).

123. 405 So. 2d 708 (Ala. 1981).

124. The mother, an evangelist, frequently took her children to church activities that lasted until 11:00 p.m. "[T]he trial judge stated that he considered [the mother's] actions . . . bordered upon abuse . . . ." *Id.* at 709. The Supreme Court of Alabama, while finding the language of the trial court's opinion too restrictive, affirmed the trial court's consideration of religion and its effect on the children. *See id.*

D. *May Courts Limit Religious Activity of Non-Custodial Parents During Visitation Periods?*

The custodial parent usually controls the child's religious education.[125] A custody award generally provides the non-custodial parent with visitation rights.[126] Because visitation often places a child in the home of the non-custodial parent on weekends and holidays, days with particular religious significance, visitation conflicts over religion are not uncommon. Usually, the custodial parent will complain either that the non-custodial parent is improperly instructing the child in a religion inconsistent with that of the custodial parent, or that the visitation interferes with the child's participation in religious activity required by the religion of the custodial parent.

The need to balance the rights of the custodial parent, the welfare of the child and the rights of the non-custodial parent, not only to visitation but also free exercise, has produced a number of highly fact-specific cases that fail to produce clear rules, but do identify some tendencies. Courts are more likely to interfere with non-custodial parents' involving children in clearly defined religious activity than in the aspects of religion which pervade everyday life. Thus, an Arizona court prohibited a non-custodial parent from taking his child to Jewish religious training during visitation periods against the custodial parent's objection,[127] but a New York court refused to order a non-custodial father to permit telephone access to his children during Sabbath visits, when the use of a telephone would violate his Orthodox Jewish principles.[128] In *Morris v. Morris*,[129] a Pennsylvania court prohibited a non-custodial father from taking his child to Sunday meetings and on door-to-door religious solicitation, but noted that it did not prohibit him from discussing his Jehovah's Witness beliefs with the child.[130]

A number of courts, however, have held that even religious services and instruction will not be interfered with in the absence of a clear showing that exposure to a different religion is harming the child.[131] Some

125. *See* Note, *The Religious Upbringing of Children After Divorce*, 56 Notre Dame Law. 160, 162 (1980).

126. *See id.* at 167. The exact nature of visitation is unclear. It has been argued that a non-custodial parent has a right to some access to a child. *See* Novinson, *Post-Divorce Visitation: Untying the Triangular Knot*, 1983 U. Ill. L. Rev. 121, 121. But a number of courts have recognized that visitation is controlled by the overriding principle of the best interests of the child. *See* Henszey, *Visitation by a Non-Custodial Parent: What Is the "Best Interest" Doctrine?*, 15 J. Fam. L. 213, 214 (1976). Under this view, visitation is merely a privilege to the non-custodial parent. If there is a visitation right, it belongs to the child. *See* Davidson & Gerlach, *Child Custody Disputes: The Child's Perspective*, in R. Horowitz & H. Davidson, Legal Rights of Children 232, 251-55 (1984).

127. *See* Funk v. Ossman, 150 Ariz. 578, 581-83, 724 P.2d 1247, 1250-51 (Ariz. Ct. App. 1986).

128. *See* Kadin v. Kadin, 131 A.D.2d 437, 439, 515 N.Y.S.2d 868, 870 (1987).

129. 271 Pa. Super. 19, 412 A.2d 139 (1979).

130. *See id.* at 34-35, 412 A.2d at 147.

131. *See, e.g.*, *In re* Marriage of Murga, 103 Cal. App. 3d 498, 505, 163 Cal. Rptr. 79,

courts insist on showings of anxiety, guilt or hostility toward the custodial parent before the court will intervene.[132] In *Felton v. Felton*,[133] a Massachusetts court suggested that, contrary to the assumption that consistency is essential in religious education, exposure to different "religious models" should be considered beneficial.[134] Other courts, such as the *Morris* court, assume that religious differences are necessarily confusing and harmful to children.[135]

Several courts have tailored or modified visitation rights to ensure that the child would fulfill religious obligations imposed by the faith of the custodial parent even when the child was with the non-custodial parent. For example, courts have upheld requirements that non-custodial parents transport children to weekend services or religious education classes,[136] as well as those that require the child to be returned to the custodial parent from visits for regular religious observances.[137] But this is not always the case, as some courts have held that such orders are not clearly in the best interests of the child and are too great an intrusion into the visitation rights of the non-custodial parent.[138]

E. *May the Religion of Prospective Parents Be a Factor in Adoption?*

The question of religion presents itself in two principal ways in adoption cases: the presence or absence of religious belief as evidence of the suitability of prospective adoptive parents; and the use of "religious matching," a system which favors placement of a child with adoptive parents of the same faith.

The presence of religion in the home of a prospective adoptive parent has been held to be a proper consideration in a broad inquiry into fitness

82 (1980) (non-custodial father can involve child in religious activities unless activities are shown to harm child); Robertson v. Robertson, 19 Wash. App. 425, 427, 575 P.2d 1092, 1093 (1978) (factual showing of danger to child's welfare is required for court interference with non-custodial parent's religious training of child). The same result was reached in Robert O. v. Judy E., 90 Misc. 2d 439, 395 N.Y.S.2d 351 (N.Y. Fam. Ct. 1977), where the custodial mother objected to the father taking the child to religious services during visitation, not because it conflicted with the mother's religious training, but because the mother objected to any organized religion. *See id.* at 440-41, 395 N.Y.S.2d at 352.

132. *Compare Morris*, 271 Pa. Super. at 25, 412 A.2d at 142 ("it is beyond dispute that a young child reared into two inconsistent religious traditions will quite probably experience some deleterious physical or mental effects") *with* Munoz v. Munoz, 79 Wash. 2d 810, 815, 489 P.2d 1133, 1136 (1971) ("We are not convinced . . . absen[t] evidence to the contrary, that duality of religious belief[ ] . . . creates a conflict upon young minds. Because of their young ages, it is doubtful that the children in this case sufficiently understand the religious teachings to be concerned about any conflicting beliefs.").

133. 383 Mass. 232, 418 N.E.2d 606 (1981).

134. *See id.* at 234-35, 418 N.E.2d at 607-08.

135. *See* Morris v. Morris, 271 Pa. Super. 19, 24-25, 412 A.2d 139, 142 (1979).

136. *See* Overman v. Overman, 497 N.E.2d 618, 619 (Ind. Ct. App. 1986); Chapman v. Chapman, 352 N.W.2d 437, 441 (Minn. Ct. App. 1984).

137. *See* Chasan v. Mintz, 119 N.H. 865, 866-68, 409 A.2d 787, 787-88 (1979).

138. *See* Angel v. Angel, 2 Ohio Op. 2d 136, 138, 140 N.E.2d 86, 88 (Ohio Com. Pl. 1956); Matthews v. Matthews, 273 S.C. 130, 133, 254 S.E.2d 801, 803 (1979).

of a prospective parent and the best interests of the child.[139] On the other hand, it is not to be accorded any special weight and rarely is determinative.[140] The New Jersey Supreme Court has held that denial of an adoption on grounds of the applicants' atheism would be unconstitutional.[141] It is possible that other jurisdictions have not made similar clear rulings because their courts have not been presented with this specific question; perhaps adoption agencies accept the fact that the presence of religion is not to outweigh other indicia of fitness.[142]

Several states have matching statutes that provide that, whenever practicable, a child should be placed for adoption with parents of the same religion as the child or the child's natural parents.[143] The "when practicable" language has enabled courts to construe the statute as a declaration that religious matching is desirable, but not a requirement which overrides evidence that a non-matching placement is in the child's best interests. Where insistence on religious matching would substantially delay placement of the child,[144] or cause denial of an application by particularly well-suited parents,[145] matching is not required. Interpreted in this way, religious matching statutes have survived establishment clause challenges.[146]

Religious matching statutes raise two questions. First, are they meant to protect the natural parents' interest in their child's religion, or are they meant to address other concerns? Some courts indicate that religious matching is not a significant factor where the natural parent is indifferent to the child's new religious atmosphere. Others have held that the statute operates independent of the desires of the natural parents.[147] Second,

139. *See In re* Bourque, 245 So. 2d 525, 530 (La. Ct. App. 1971); Dickens v. Ernesto, 30 N.Y.2d 61, 64, 281 N.E.2d 153, 154, 330 N.Y.S.2d 346, 347 (1972).

140. *See, e.g., Dickens*, 30 N.Y.2d at 64, 281 N.E.2d at 155, 330 N.Y.S.2d at 347 ("Religion has always been a relevant and important, though not controlling, consideration in this State in the placement of children for adoption."); Commonwealth v. White, 403 Pa. 55, 62, 169 A.2d 69, 73 (1961) ("Proper religious training of a child is most important and a factor which must be given the most serious consideration .... However, such factor, while of great weight, is not controlling.").

141. *In re* Adoption of "E", 59 N.J. 36, 54, 279 A.2d 785, 794 (1971). The court, however, did not object to consideration of religion as one factor in a broad analysis of best interests.

142. This acceptance by adoption agencies is similar to the commonly asserted principle that religion in custody disputes between parents is relevant, but not determinative. *See supra* notes 106-138 and accompanying text.

143. *See* Note, *Religious Matching Statutes and Adoption*, 51 N.Y.U. L. Rev. 262, 262 n.1 (1976).

144. *See In re* Efrain C., 63 Misc. 2d 1019, 1025-26, 314 N.Y.S.2d 255, 263 (N.Y. City Fam. Ct. 1970).

145. *See In re* Adoption of Michael D., 37 A.D.2d 78, 79, 322 N.Y.S.2d 532, 533 (1971).

146. *See In re* Goldman, 331 Mass. 647, 652-53, 121 N.E.2d 843, 846 (1954), *cert. denied*, 348 U.S. 942 (1955); Dickens v. Ernesto, 30 N.Y.2d 61, 67-68, 281 N.E.2d 153, 156-57, 330 N.Y.S.2d 346, 350 (1972).

147. *Compare In re* Anonymous, 46 Misc. 2d 928, 929, 261 N.Y.S.2d 439, 441 (N.Y. Fam. Ct. 1965) (when natural mother consents to different religious upbringing, match-

where the prospective parents' religion is matched with that of the child, how is the child's faith to be determined? A state might look to family heritage, to formal religious acts such as baptism or circumcision,[148] or might arbitrarily allocate children to different religions.[149] There has been surprisingly little judicial discussion about the constitutional acceptability of such practices.[150]

III. PURPOSES, EFFECTS, ENDORSEMENTS AND NEUTRALITY: CAN THE USE OF RELIGION BE JUSTIFIED?

Nearly all would agree that the government's purpose in considering religion may not be to promote religion for its own sake. The following sections will identify and discuss possible secular purposes and effects that might support the use of religion as an element in child custody and adoption determinations.

A. *Promoting the Welfare of the Child*

Most child custody decisions acknowledge that ensuring the child's best interests is the goal of such proceedings. Best interests, however, can be defined in two different ways.[151] Best interests may mean the welfare and happiness of the individual, as defined by that individual. What course of action will lead to individual happiness, regardless of what society may think about the reasons for that happiness? Best interests may also refer to a set of more objective, socially approved standards. Is the child likely to become a well-educated, law-abiding, productive member of society?[152]

This dichotomy may be more theoretical than real. Individual happiness may depend on the rewards society bestows on those who exhibit approved behavior. Thus, a child may be placed in an environment likely to promote development in socially approved ways in order to make the child happy in the long run. Still, for purposes of analysis it is helpful to separate the individual's subjective view of a good life from the

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ing statute has little weight), *with In re* Goldman, 331 Mass. at 652-53, 121 N.E.2d at 846 (natural mother's consent does not override statutory mandate of matching).

One court has held that religious matching statutes are constitutional only insofar as they further the stated preferences of the natural parent. *See* Note, *Religious Matching and Parental Preference:* Easton v. Angus, 1986 Utah L. Rev. 559 (discussing an unreported decision, Easton v. Angus, No. C084-1061W (D. Utah June 13, 1985)).

148. *See* Ramsey, *The Legal Imputation of Religion to an Infant in Adoption Proceedings*, 34 N.Y.U. L. Rev. 649 (1959).

149. At least one court has indicated that allocation without reference to natural parentage or parental preference would be unconstitutional. *See* Scott v. Family Ministries, 65 Cal. App. 3d 492, 505-06, 135 Cal. Rptr. 430, 438 (1976).

150. For a comprehensive summary of the discussion that has taken place, see Ramsey, *supra* note 148, at 680-84.

151. *See* Chambers, *supra* note 4, at 488-94.

152. *See id.* In other legal contexts, there may be a third way to define a child's best interests, by deference to the view of the parents. But, of course, if parents disagree, there is no view to which the state can defer. *See id.* at 489.

community's objective view of the individual's welfare. If the choice is between self-defined happiness and growth into socially approved roles, libertarians would choose the former.[153] For that reason, this Article will define the child's welfare as subjective. That definition, however, need not limit the inquiry to the child's subjective preferences at the time of the decree; the child's subjective best interests in the long run may also be considered. The state's interest in promoting objectively defined good qualities will be considered as a factor distinct from the child's subjective best interests.

1. Emotional Well-Being and Religion

Research has examined the relationship between religion and emotional well-being. Professor Allen Bergin has analyzed studies conducted from 1951 through 1979 in which some measure of religiousness was correlated with some measure of emotional health (such as self-esteem, ego strength and adjustment) or pathology (such as hostility, anxiety or neuroticism).[154] The results were mixed. Bergin concluded that the literature provides "marginal support for a positive effect of religion."[155]

More recent studies provide some assistance in reconciling these contradictory findings. One of the most difficult challenges in attempting to research the effects of religion is to find a reliable indicator of religion. Studies have used church attendance, self-identification as a church member and orthodox beliefs as indicative of the presence of religion.[156] Recently, social scientists have attempted to be more precise and sophisticated in their measurement of religion and in doing so, have produced some interesting results.

Paloutzian and Ellison have developed a 20-item questionnaire which they have called the Spiritual Well-Being Scale (SWB).[157] The SWB measures orientation to "transcendence, or the capacity to find purpose

153. "[M]ost Americans would be repulsed by a statute that abandoned a concern for the child's interests and baldly provided for the resolution of their custody in the manner that served the 'best interests of the state.' And well they should." *Id.* at 492.

154. *See* Bergin, *Religiosity and Mental Health: A Critical Reevaluation and Meta-Analysis*, 14 Prof. Psychology Res. & Prac. 170 (1983).

155. Bergin found religion positively linked to mental health in 47 percent of reported effects, negatively linked in 23 percent, with 30 percent showing no relationship. Most of the positive or negative results were quite weak; only 7 of 30 outcomes produced statistically significant relationships between religion and mental health. Five of these showed positive relationships, two negative. *See id.* at 176.

156. For an extensive survey of approaches to assessing religiosity, see Roof, *Concepts and Indicators of Religious Commitment: A Critical Review*, in The Religious Dimension: New Directions in Quantitative Research 17-41 (R. Wuthnow ed. 1979). The use of a single, static measure of religiosity, especially self-identification with a denomination, is criticized by Larson in *Systematic Analysis of Research on Religious Variables in Four Major Psychiatric Journals, 1978-1982*, 143 Am. J. Psychiatry 329 (1986). Larson and his colleagues found that psychiatric research in this area is less sophisticated than the work of psychologists or sociologists. *See id.* at 333.

157. *See* Ellison, *Spiritual Well-Being: Conceptualization and Measurement*, 11 J. Psychology & Theol. 330 (1983).

and meaning beyond one's self and the immediate and to relate positively to God, parenting and life experiences which promote trust and fundamental optimism."[158] In several studies, high SWB scores have been found to correlate positively with a sense of hope,[159] purpose in life,[160] self-esteem[161] and social skills,[162] and to correlate negatively with loneliness.[163] While the SWB findings are interesting, they may do no more than add to the overall volume of contradictory findings on the relationship of religion to secular well-being.

The SWB, however, is divisible into two distinct sub-measures. Ten of the 20 items specifically refer to God and the extent to which the respondent feels a sense of transcendence in traditional theistic terms. The responses on these 10 items are referred to as the Religious Well-Being (RWB) subscale.[164] The other 10 measure a sense of purpose transcending self, but without overt theistic overtones. This subscale has been labelled Existential Well-Being (EWB).[165] While the SWB, RWB and EWB scales all quite consistently correlate positively with measures of emotional health and well being, the EWB subscale provides much stronger support for this correlation than does the RWB subscale.[166] Empirical studies have shown that well-being is clearly furthered by "transcendence, or the capacity to find purpose and meaning beyond one's self and the immediate," but that traditional theism is not the sole path to achieving that capacity.[167]

2. The Importance of the Definition of Religion

These findings indicate that the inconsistency of earlier studies may not arise from any lack of correlation between religion and well-being, but rather suggest that the inconsistency stems from disagreement over

158. *Id.* at 338.

159. *See* Carson, Soeken & Grimm, *Hope and its Relationship to Spiritual Well Being*, 16 J. Psychology & Theol. 159, 163 (1988).

160. *See* Dufton & Perlman, *The Association Between Religiosity and the Purpose-in-Life Test: Does it Reflect Purpose or Satisfaction?*, 14 J. Psychology & Theol. 42, 47 (1986).

161. *See* Ellison, *supra* note 157, at 336.

162. *See id.* at 335.

163. *See* Paloutzian & Ellison, *Loneliness, Spiritual Well-Being and the Quality of Life*, in Loneliness: A Sourcebook of Current Theory, Research and Therapy 224, 234 (L. Peplau & D. Perlman ed. 1982). If one accepts the connection between loneliness and physical illness, *see, e.g.*, J. Lynch, The Broken Heart: The Medical Consequences of Loneliness *passim* (1977) (examining biological basis for need for human relationships and ill effect of loneliness on health), then spiritual well being may also correlate with physical health. *See* Ellison, *supra* note 157, at 338.

164. *See* Ellison, *supra* note 157, at 332-33.

165. *See id.*

166. *See id.* at 333-35 (data summarized in tables 1-3); *see also* Carson, Soecken & Grimm, *supra* note 159, at 165-66 (reaching same conclusion in their study of correlation of spiritual well being and hope). This conclusion is strengthened by the fact that it not only surprised but apparently disappointed Carson and her colleagues. *See* Carson, Soecken & Grimm, *supra* note 159, at 165-66.

167. Ellison, *supra* note 157, at 338.

the meaning of the term "religion." It is, therefore, important to define the term "religion" before attempting to defend or attack its place in any legal analysis.

The classic Supreme Court statement concerning religion focused on conventional Western theism, prayer and worship. The Court stated: "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[168] A religion was something that resembled conventional Christianity, that is, an explicitly theistic faith, oriented primarily toward other-worldly concerns, and most likely practiced as a member of a recognized church.[169] This traditional definition, however, may no longer be valid.

Robert Bellah has described the evolution of religious thought, specifically the extent to which it focuses on transcendent, other-worldly concerns as opposed to integrating itself into social concerns.[170] Bellah has noted that primitive religion was nearly indistinguishable from other aspects of community life.[171] Religion then evolved into what Bellah calls "historic religion," stressing its separateness from worldly concerns and its "exaltation of another realm of reality as alone true and infinitely valuable."[172] That conception has been replaced in the last century by "modern religion," which attempts to reunite transcendent and social concerns.[173] Changes in religion itself demanded reassessment of the legal definition of the term.

The Supreme Court recognized, in the 1961 case of *Torcaso v. Watkins*,[174] that there could be religions "which do not teach what would generally be considered a belief in the existence of God."[175] More significantly, in a pair of Vietnam war era cases clarifying eligibility of draft-age men for conscientious objector status based on "religious training

168. Davis v. Beason, 133 U.S. 333, 342 (1890).

169. This definition was probably inevitable because the overwhelming majority of Americans who called themselves religious (as well as those who denied religious leanings) came from a tradition of conventional Judeo-Christian thought and practice. There was little reason to question this conventional thinking because, prior to the 1960's, there was little religion clause jurisprudence. *See supra* notes 39-65 and accompanying text.

170. *See* Bellah, *Religious Evolution*, 29 Am. Soc. Rev. 358, 374 (1964).

171. *See id.* at 360. Bellah found early religion to be a primitive stage in which religion was almost impossible to distinguish from other aspects of community life. *See id.*

172. *Id.* at 359. This stage, known as "historic religion," resulted from an evolution of ideas in which religion became more differentiated from community life by focusing on the transcendent. *See id.* at 366. Historic religions, then, are transcendental, they stress the separateness of religious and political structures, and seek to set the believer apart from ordinary worldly concerns. "The differentiation of a religious elite brought a new level of tension and a new possibility of conflict and change onto the social scene." *Id.* at 368.

173. *See id.*

174. 367 U.S. 488 (1961). The case held unconstitutional Maryland's requirement that public officers declare belief in God.

175. *Id.* at 495 n.11 (Court cited Buddhism, Taoism, Ethical Culture and Secular Humanism as examples).

and belief,"[176] the Court endorsed a broad definition of that term.[177]

The Court held that religious belief could include any comprehensive system of ultimate concerns that creates "duties superior to those arising from any human relation,"[178] regardless of whether the belief was articulated in theistic terms or practiced in a traditional church or sect.[179] Courts have applied this broad, non-traditional definition in both establishment clause and free exercise clause cases.[180] The scope of religion, while far broader than under a traditional definition, is not limitless.[181] Furthermore, the broad definition has been criticized as being fuzzy.[182]

The choice of a definition will have significant impact on the outcome of this analysis. If religion is narrowly defined as traditional theism or church membership, there is no reason to believe that a religious upbringing is more consistent with the best interests of a child than a non-religious upbringing.[183] But if the broad view of religion, defined as a

176. Military Selective Service Act of June 24, 1948, Ch. 625, 62 Stat. 604 (codified as amended at § 6(j), 50 U.S.C. § 456(j) (Appendix, 1982)).

177. *See* Welsh v. United States, 398 U.S. 333, 339 (1970); United States v. Seeger, 380 U.S. 163, 164-66 (1965).

178. *Seeger*, 380 U.S. at 173-85 (discussing meaning of "religious training and belief," as defined by Congress and included in early version of Selective Service Act) (citation omitted); *see Welsh*, 398 U.S. at 338-44 (same). In reaching this holding, the Court drew heavily on liberal Protestant thought. *See Seeger*, 380 U.S. at 180-81 (citing work of Dr. Paul Tillich and Bishop John Robinson).

179. *See Seeger*, 380 U.S. at 177-78. The Court cautioned that the definition was only for the purposes of interpreting the Selective Service Act, *see id.* at 174, but the definition has been widely adopted. The broad definition may have been required to avoid holding the entire 6(j) exemption unconstitutional as an establishment clause violation. *See Welsh*, 398 U.S. at 344-67 (Harlan, J., concurring).

180. *See, e.g.*, Africa v. Pennsylvania, 662 F.2d 1025, 1036 (3d Cir.) ("Naturalist" movement MOVE found not to be a religion, even under *Seeger* and *Welsh* standards for purposes of free exercise claim), *cert. denied*, 456 U.S. 908 (1982); Malnak v. Yogi, 592 F.2d 197, 199 (3d Cir. 1979) (transcendental meditation found to be a religion for establishment clause purposes).

181. *See, e.g.*, United States v. Allen, 760 F.2d 447, 450 (2d Cir. 1985) (rejecting plaintiff's claim that set of beliefs promoted by government constituted a religion of "nuclearism"); *Africa*, 662 F.2d at 1036 (MOVE not a religion for free exercise purposes).

182. The definition has been criticized by those who advocate a return to the narrower definition of religion and by those who advocate the use of different definitions depending upon the interest involved. *See* L. Tribe, American Constitutional Law § 14-6, at 827-28 (1978) (advocating two different definitions); *see also* Note, *Toward a Constitutional Definition of Religion*, 91 Harv. L. Rev. 1056 (1978) (advocating different definitions). While there are cases that endorse a dual definition approach, *see* Sheldon v. Fannin, 221 F. Supp. 766, 774-75 (D. Ariz. 1963), more typical is the rejection of the notion that the same word can have two different meanings in the same sentence of the first amendment, as found in *Malnak*. *See Malnak*, 592 F.2d at 211 (Adams, J., concurring); *see also* Choper, *Defining "Religion" in the First Amendment*, 1982 U. Ill. L. Rev. 579, 605 (close examination of operative doctrine for religion clauses suggests dual definition of religion not required). Professor Tribe appears to have had second thoughts on this subject, calling the dual definition approach "a dubious solution to a problem that, on closer inspection, may not exist at all," and turns his attention from the definition of "religion" to the definition of "free exercise" and "establishment." L. Tribe, *supra* note 69, § 14-6, at 1186-87 (2d ed. 1988).

183. *See supra* notes 85-105 and accompanying text. *See, e.g.*, Mangrum, *Exclusive*

commitment to some "ultimate concern," a coherent set of beliefs that transcend and give meaning to everyday existence contained in cases such as *Torcaso* and *Seeger*[184] is used, then there is consistent evidence that religion is a source of mental and emotional well-being. Keeping this important definitional point in mind, the proposition that the use of religion as a factor in custody or adoption decisions has the purpose and effect of promoting the welfare of the child, clearly a legitimate secular interest, may not be easily dismissed.

Also significant in any discussion of the welfare of the child is the value of stability. Since the publication in 1973 of Goldstein, Freud and Solnit's *Beyond the Best Interests of the Child*,[185] in which the authors emphasized the importance to the child of continuity of relationships and recommended legal standards to further that goal as much as possible,[186] courts have stressed the value of stability and certainty in child custody arrangements.[187] While these conclusions have not been unanimously accepted and, indeed, call into question the wisdom of increasingly popular joint custody arrangements,[188] the widespread acceptance of stability as a value in furthering the best interests of the child should be noted in addressing the issues under discussion here.

B. *Promoting the Welfare of Society*

The best interests test may seem, at least in part, as meant to promote the shaping of "good" children, rather than merely happy children. While the legitimacy of this goal could be challenged, it would seem to

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Reliance on Best Interest May Be Unconstitutional: Religion as a Factor in Child Custody Cases, 15 Creighton L. Rev. 25, 55-74 (1981) (arguing that use of religion as factor is unconstitutional except where child has actual religious needs or, as negative factor where parent's religious practices are illegal or "threaten imminent and substantial harm" to child); Note, *The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interest Equation*, 82 Mich. L. Rev. 1702, 1728-29 (1984) (arguing that religion may be factor only when child has personal religious convictions); Note, *supra* note 143, at 283 (arguing against constitutionality of religious matching statutes).

184. *See supra* notes 168-182 and accompanying text.

185. J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child (1973).

186. *See id.* at 31-39 (discussion of continuity of relationships).

187. *See* A. Haralambie, Handling Child Custody Cases 34-35 (1983). Court decisions stressing stability and certainty may not be the result of Goldstein, Freud and Solnit's book, but the courts have relied on the book extensively. *Beyond the Best Interests of the Child* has been cited over 150 times—12 times by federal courts (Westlaw, federal library, Allfeds file) and 147 times by state courts (Westlaw, states library, Allstates file).

There has been much criticism of Goldstein and his colleagues for their failure to support their conclusions with empirical evidence. These critics, however, tend to focus not on the overall value of consistency, but on the difficulty of assessing the best way to provide consistency and particularly on Goldstein and his colleagues' conclusion that the visitation rights of the non-custodial parent should be sharply limited. *See generally* Rohman, Sales & Lou, *The Best Interests of the Child in Custody Disputes*, in Psychology and Child Custody Determinations 59, 70-75 (L. Weithorn ed. 1987).

188. *See* Twiford, *Joint Custody: A Blind Leap of Faith?*, 4 Behav. Sci. & Law 157, 167 (1986).

qualify as secular as long as the definition of a "good" person does not include religion for its own sake. One commentator argues that values perceived to be objectively desirable will inevitably creep into custody decisions, openly or covertly. He further states "a court would be justified in candidly . . . preferring the parent whose values more *closely* reflect such qualities as tolerance, charity, compassion, a sense of social duty, respect for independence of mind . . ., whether the cultural values in conflict have a secular or religious origin."[189] This list is certainly a respectable short catalogue of values that a liberal society might seek to promote. Can religion be used in child custody and adoption decisions as a way to further and strengthen secular values in children and, therefore, in society?

Research has been undertaken to explore the connections between religious belief and social attitudes. As was the case with social science literature on the connection between religion and emotional well-being, a quick overview of the research establishes no clear connections between religious belief and social values. Studies disagree on whether religion is linked with juvenile delinquency or other clearly anti-social behavior[190] and early research indicated a positive link between religiousness and racial prejudice and intolerance.[191] The mere existence of religiosity, then, would not seem to be reliable evidence of an environment likely to promote the pro-social values respected in a liberal democratic community.

Once again, however, more precise consideration of the evidence provides more meaningful information. While there is no indication that religion per se is linked to positive social values and behavior, there is reason to believe that this is true in certain types of religion. The distinction is not between any particular denomination and others,[192] but rather between two types of religiousness labeled by sociologist Gordon Allport as "intrinsic" and "extrinsic."[193]

Intrinsic religious believers are seriously committed to their religious

189. Mucci, *The Effect of Religious Beliefs in Child Custody Disputes*, 5 Can. J. Fam. Law 353, 360-61 (1986) (emphasis in original).

190. *See* Jensen & Erickson, *The Religious Factor and Delinquency: Another Look at the Hellfire Hypothesis*, in The Religious Dimension: New Directions in Quantitative Research 157-77 (R. Wuthnow ed. 1979). Jensen and Erickson summarize the conflicting earlier research. *See id.* at 157-60. Their own study leads them to conclude that "the view that organized religion is ineffective or irrelevant [in controlling delinquency]" is both supported and refuted "depending on the particular findings one chooses to highlight." *Id.* at 174-75.

191. *See generally* T. Adorno, E. Frenkel-Brunswik, D. Levinson & R. Sanford, The Authoritarian Personality 212 (1950) (discussing prejudice and intolerance); Allport & Kramer, *Some Roots of Prejudice*, 22 J. Psychology 25-26 (1946).

192. The major finding of Wuthnow is that, in general, denomination is becoming far less of an indicator of the substance of religious belief in America than the question of whether one's religious beliefs are liberal or conservative. *See generally* R. Wuthnow, *supra* note 106, *passim*.

193. Allport, *The Religious Context of Prejudice*, 5 J. Sci. Study Religion 447, 454-56 (1966).

beliefs and treat those beliefs as valuable in themselves.[194] Extrinsic believers, in contrast, conform their acts and beliefs to religious norms in order to achieve other ends, such as social acceptance.[195] Allport, whose early research indicated a positive correlation between religion and racial prejudice,[196] modified his position on the basis of this dichotomy. Intrinsic religious belief was found to indicate low levels of prejudice; extrinsic religiosity, on the other hand, was "entirely compatible with prejudice."[197] This intrinsic-extrinsic distinction has been widely accepted and extended by others to indicate that intrinsic religiosity is linked to traits such as friendliness and helpfulness.[198]

Others who have challenged the value of the intrinsic-extrinsic distinction have attempted to forge other meaningful ways of categorizing religions that will correlate reliably with pro-social attitudes.[199] Perhaps the most interesting approach is the "quest" orientation to religion. Daniel Batson and his colleagues have contended that the best religious indicator of low prejudice is religiosity "in which religion is an open-ended process of pursuing ultimate questions more than ultimate answers,"[200] that is, in which religion is a "quest." When religion is commitment to a closed set of norms, they report, it does not lead to low levels of prejudice.[201]

Despite continuing skepticism,[202] there is substantial evidence that religious beliefs can bring about socially desirable attitudes and behavior. However, this is so only for certain types of religiosity, types which cut across denominational lines. This section is merely attempting to identify and examine possible secular purposes and effects that might justify the use of religion as a factor in custody and adoption proceedings.

194. *See id.* at 455.

195. *See id.*

196. *See* Allport & Kramer, *supra* note 191, at 378.

197. Allport, *supra* note 193, at 456; *see also* Allport & Ross, *Personal Religious Orientation and Prejudice*, 5 J. Personality & Soc. Psychology 432, 434-35 (1967).

198. *See* Donahue, *Intrinsic and Extrinsic Religiousness: Review and Meta-Analysis*, 48 J. Personality & Soc. Psychology 400, 415-16 (1985); Morgan, *A Research Note on Religion and Morality: Are Religious People Nice People?*, 61 Soc. Forces 683, 691 (1983).

199. *See* Griffin, Gorsuch & Davis, *A Cross-Cultural Investigation of Religious Orientation, Social Norms, and Prejudice*, 26 J. Sci. Study Religion 358, 364-65 (1987) (intrinsic religiosity correlates negatively with prejudice only when overall culture sends message that prejudice is socially undesirable); Roof, *Religious Orthodoxy and Minority Prejudice: Causal Relationship or Reflection of Localistic World View?*, 80 Am. J. Soc. 643, 660-61 (1979) (rather than standing in cause-effect relationship, racial prejudice and certain religious beliefs are both reflections of narrow world view and limited social perspectives).

200. Batson, Naifeh & Pate, *Social Desirability, Religious Orientation and Racial Prejudice*, 17 J. Sci. Study Religion 31, 40 (1978).

201. *See id.* Like Griffin and his colleagues, *see* Griffin, Gorsuch & Davis, *supra* note 199, at 358-59, Batson and his colleagues consider intrinsic religiousness a reliable indicator of absence of prejudice only where supported by social norms. *See* Batson, Naifeh & Pate, *supra* note 200, at 36. They find, however, that "quest" religious orientation correlates with low prejudice regardless of social desirability. *See id.* at 37-40.

202. *See* Griffin, Gorsuch & Davis, *supra* note 199, at 363-65.

Thus, the discussion of the constitutional significance of these findings will follow later in the Article.

C. *Protection of the Rights of Individuals or Groups*

The obvious tension between the establishment and free exercise clauses frequently forces courts to classify a dispute as being over free exercise or over the establishment of religion. In doing so, courts allow the protection of free exercise to itself serve as a legitimate purpose and effect in establishment clause analysis.[203] The use of religion as a factor in custody or adoption cases might be justified as furthering several types of rights.

The most obvious of the rights legitimately protected in custody cases are the free exercise rights of parents. Insisting that parents curtail religious practices or violate religious precepts in order to gain or retain rights of custody or visitation raises serious constitutional questions. Rules should be structured at least to minimize any interference with parents' free exercise of religion.

Closely related, in this context, to the parents' free exercise rights are the rights of parents to shape the values and education of their children and to exercise control over family life. Courts traditionally recognized the right of parents to guide the education and development of their children and have deferred to the judgment of parents in these areas.[204] While this right is not unlimited,[205] Supreme Court decisions upholding the right of parents to send their children to parochial school[206] or to have their children learn foreign languages[207] predate the recognition of strong free exercise rights.

Similarly, the free exercise rights of the child, although often difficult to assess, should be respected. Significant cases involving children and free exercise rights tend to arise in situations in which the parent pursues the child's right; it is difficult to assess whether the court is considering the right of the parent or of the child.[208] The very concept of a child having a religion, independent of that of the parents, can be troublesome,

203. *See* Widmar v. Vincent, 454 U.S. 263, 271 (1981) (*Lemon* test requires that a government policy's "principal or primary effect must be one that neither advances nor inhibits religion").

204. "It is not seriously debatable that the parental right to guide one's child intellectually and religiously is a most substantial part of the liberty and freedom of the parent." Pierce v. Society of Sisters, 268 U.S. 510, 518 (1925); *see* Meyer v. Nebraska, 262 U.S. 390, 400 (1923) ("it is the natural duty of the parent to give his children education suitable to their station in life").

205. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158 (1944) (statute prohibiting minors from selling newspapers and other articles on street doesn't violate freedom of religion); Jehovah's Witnesses v. King County Hosp., 278 F. Supp. 488, 504-05 (W.D. Wash. 1967) (denying parents' right to refuse transfusion for children), *aff'd*, 390 U.S. 598 (1968) (per curiam).

206. *See* Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

207. *See* Meyer v. Nebraska, 262 U.S. 390 (1923).

208. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Prince v. Massachusetts, 321 U.S.

especially in the case of younger children.[209]

In some cases it is proper to speak of a child's own free exercise right, independent of that of the parents. Where a child is old enough to articulate particular religious beliefs, to feel a sense of membership and to identify as an adherent of some religion, the child should be seen to have some rights of independent free exercise. This Article will not attempt a complete exploration of the scope of these rights, but merely notes that respect for such rights may qualify as a legitimate purpose for government use of religious factors in custody and adoption decisions.

Religious communities have some sort of rights in these disputes. With specific reference to the religion clauses, a long line of precedent recognizes that religious organizations have the right to a greater degree of freedom in conducting their affairs than would apply to ordinary corporate entities.[210] Supreme Court decisions protecting parental rights and individual free exercise rights have sometimes largely drawn on the connection between those rights and the need of a religious community to sustain itself.[211]

Most prominent among these decisions is *Wisconsin v. Yoder*,[212] which deferred to the customs of the Amish community even while discussing individual free exercise and familial rights.[213] The Wisconsin statute in *Yoder* threatened the existence of the community. In the case of a religious community with a long history and clearly defined rules, preservation of the community was seen as a positive constitutional value.[214]

158 (1944); Grove v. Mead School Dist., 753 F.2d 1528 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985).

209. *See generally* Ramsey, *supra* note 148, at 649 (discussing legally imputing religion to young children).

210. *See, e.g.*, Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724 (1976) ("the First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government"); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969) (first amendment "commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine"); Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94, 120-21 (1952) ("when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls").

211. *See* Wisconsin v. Yoder, 406 U.S. 205, 217-18 (1972). In Pierce v. Society of Sisters, 268 U.S. 510 (1925), a religious order challenged the state restriction, invoking their own rights as well as those of parents and children. *See id.* at 535-36. In Meyer v. Nebraska, 262 U.S. 390 (1923), the maintenance of fluency in the language of their parents was at issue and was intimately tied to the maintenance of the immigrant communities' cultural and religious heritage. *See id.* at 398-401; C. Curran, American Catholic Social Ethics: Twentieth Century Approaches 92-98 (1982) (discussing historical preservation of fluency as cultural foundation for German Americans).

212. 406 U.S. 205 (1972).

213. Expert testimony was introduced to the effect that the Wisconsin statute "would ... ultimately result in the destruction of the Old Order Amish church community." *Id.* at 212. At least with respect to the Amish, preservation of the individual's free exercise right was seen as inextricably linked to the preservation of the community. *See id.* at 217-19.

214. *See id.* at 223-27.

Where "group rights" come into conflict with claims of individual rights, they most likely will not prevail, but where there is no such clash of rights claims, government should take seriously the claims of religious groups to some basic rights, most narrowly the right to a continued existence.

Respect for the right of a religious community to perpetuate itself could raise an establishment clause concern as undue solicitousness toward religion, precisely the type of "establishment" forbidden by the first amendment. But the preservation of distinct voices and minority cultures may not be the sort of endorsement that threatens first amendment values.[215]

This section has identified and discussed interests that might be put forward by government to justify the use of religion in custody or adoption decisions. When asked for a legitimate secular purpose or effect of such use, government may plausibly argue (a) furtherance of the welfare of the child, (b) promotion of values in its citizens that will benefit society or (c) protection of rights, with respect to religion, held by children, their parents or religious communities. A framework has now been established to analyze the issues put forward in Part II and to determine whether current law is consistent with first amendment norms.

IV. PUTTING THE PIECES TOGETHER: ARE CURRENT STANDARDS CONSTITUTIONALLY JUSTIFIED?

As discussed earlier, under the establishment clause test that courts currently apply, a challenged practice must have a secular purpose, a primary secular effect and must avoid excessive entanglement between government and religion. Justice O'Connor's increasingly influential approach focuses on whether a government practice has endorsed or created the perception of endorsing religion. This will turn, to a large extent, on the same purposes and effects of the government acts. As noted above, free exercise issues arise where a parent must choose between religious practices and custody or visitation of children. Both religion clauses are implicated when government uses religion as a factor in child custody or adoption decisions. Are current approaches constitutionally valid?

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215. *See* R. Dworkin, A Matter of Principle 221-25 (1985); L. Tribe, *supra* note 69, § 16-2, at 1521-44 (2d ed. 1988). Dworkin supports the principle that government support targeted to preserve voices that cannot survive through the workings of the marketplace produces a more diverse society, and is therefore consistent with first amendment pluralism. *See id.*

For a discussion of the role of adoption in threatening minority cultures in another context, see McCartney, *The American Indian Child-Welfare Crisis: Cultural Genocide or First Amendment Protection*, 7 Colum. Hum. Rts. L. Rev. 529 (1975).

A. *May Religion Be Considered in Determining the Best Interests of the Child?*

May statutes and judicial decisions weigh the likelihood that a child will receive a religious upbringing in making custody decisions? If so, may they do so only where there are clear, individualized showings of physical or emotional consequences to the child, including, in the case of a mature child, where the child has "actual" religious needs?[216] In these limited situations, consideration of religion seems fully justified. An individualized showing of secular benefit or harm to the child will suffice as a primary secular effect, seeking such benefit or avoiding such harm is a secular purpose and determining the presence of such an effect requires no more intrusive an inquiry than that which takes place in a custody hearing free of religious considerations. Seeking to determine and further the religious beliefs of a mature child can both further the child's welfare, particularly the child's need for stability, and protect a mature child's emerging free exercise rights.

As outlined above, however, a number of statutes or courts do not limit the use of religion to these narrow situations, but regard the presence of religion as a positive factor in assessing the quality of a family environment.[217] Commentators who have criticized this tendency are right to feel uneasy, but their recommendations that religion be excluded from the best interests test misconstrues the source of the problem.[218] The findings of social scientists outlined above indicate that a commitment to values beyond self does promote a happier, better adjusted life. The same findings, though, strongly indicate that this commitment need not be framed in terms of traditional theism.[219] Resolution of the question, therefore, turns on the question of the definition of "religion."

If the definition of religion is limited to traditional theism or church affiliation, there is great doubt concerning the constitutionality of the use of religion as a positive factor in custody or adoption disputes. There is only weak social science support for the proposition that such a policy will produce happier children or children who will be "better" citizens. Although weak evidence may be sufficient to satisfy the inquiry into the government's purpose for a policy (an inquiry which has never been applied too stringently),[220] it falls well short of establishing legitimate secu-

216. *See supra* notes 100-105 and accompanying text.

217. *See supra* notes 85-99 and accompanying text.

218. *See* Mangrum, *supra* note 9, at 51-74.

219. *See supra* notes 154-166 and accompanying text.

220. "Even if the text and official history of a statute express no secular purpose, the statute should be held to have an improper purpose only if it is beyond purview that endorsement of religion or a religious belief 'was and is the law's reason for existence.' " Wallace v. Jaffree, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring) (quoting Epperson v. Arkansas, 393 U.S. 97, 108 (1968)). *Epperson*, one of only a handful of Supreme Court establishment clause cases which found a violation of the secular purpose requirement, did so only upon a finding that no secular policy whatever was supported by the statute, an extremely difficult burden to meet. *See Epperson*, 393 U.S. at 106-09.

lar effects. The statement that traditional religiosity is a positive factor and its absence a negative factor endorses traditional religions, running afoul of Justice O'Connor's establishment clause test, and could act to coerce parents into professing beliefs which they do not hold to establish themselves as qualified for custody. Such coercive efforts are extremely troubling even according to the most cautious theories of the scope of the establishment clause.[221]

If, however, the expansive definition of religion as ultimate concern is employed, an entirely different picture emerges. The evidence that people whose values transcend self-interest report higher levels of emotional well-being supports the contention that the secular purpose and effect of enhancing the well-being of the child justifies consideration of the values espoused by contending parents. Evidence that a parent believes, acts pursuant to and intends to convey the message that life is purposeful, that it demands commitment beyond self-interest and that there are transcendent values, need not be excluded from best interest determinations. Indeed, such evidence should be included.

If the law must treat the parent whose values are rooted in secular philosophies the same as parents with theistic value systems, could all references to religion in custody disputes be replaced with references to morality? While a case could be made for such a conclusion, the fact remains that a large proportion of Americans do enunciate their transcendent commitments in traditional religious terms.[222] To exclude the "spiritual" might disadvantage those whose approach to providing values to their children is closely linked to traditional religion. Still, references to "religion" or "spiritual values" in statutes and cases do convey, both to the public and to judges, that government favors conventional religion. Should the language of courts and legislatures be modified to delete this language, even if evidence of religious commitment is still used to establish a parent's moral and ethical values?

Perhaps a better solution would be to make the language more rather than less extensive. Rather than considering religion as an independent factor, or deleting it and referring only to the moral well-being of the child, states using the best interests test should consider the moral environment likely to be present in the child's home; determination of the moral environment would include consideration of the religious environment. This approach would allow consideration of factors that are relevant, which may include the presence of traditional religious values, yet

221. *See* McConnell, *supra* note 67, at 936. Justice Kennedy regards coercion as one of the key indices of an establishment clause violation, along with the grant of substantial "direct benefits." County of Allegheny v. ACLU, 109 S. Ct. 3086, 3136 (1989) (Kennedy, J., concurring in part, dissenting in part).

222. Despite a sense of increasing secularization of American society, polling data continues to show that 90 percent or more of Americans profess a belief in God, about the same percentage pray at least occasionally, about one-half say that religion is very important to them, and about 40 percent attend church in a typical week. *See* R. Wuthnow, *supra* note 106, at 164-65.

explicitly place on an equal footing coherent systems of values that are not rooted in traditional religion.

If the definition of religion is expanded, or if a narrowly defined religion is one of several factors in establishing a commitment to a value system transcending self-interest, the establishment clause should be no bar to the use of religion as a factor in determining the best interests of the child. This use of religion has a legitimate secular purpose and effect, treats traditional religion no better or worse than competing systems of ultimate values, and does not endorse traditional religion. It may be true that all questions of moral and ethical values should not weigh heavily in most custody disputes.[223] But even in the absence of "actual religious needs" of the child, the religion clauses do not bar the use of religion as a positive factor in these determinations.

B. *May Courts Weigh the Merits of Different Religions?*

Social science gives us almost no reason to believe that, even if it is possible to agree that there are certain values which children should be taught, these values are associated with any particular denomination.[224] But at the same time, as social scientists refine their measures of religious commitment, they are able to make statements about certain types of religions in ways that cut across denominational lines.[225]

This discussion will assume that certain types of religion, such as "inner-directed," "quest-oriented" or "liberal"[226] cut across denominational lines and can be correlated with valued social attitudes, such as tolerance, charity and social duty. This discussion also assumes that the commitment of a state to neutrality on most value questions does not require neutrality about the value of these very traits that underlie a liberal democratic commitment.[227] Promoting these values by placing children in religious environments likely to further them might have a secular purpose and effect.

Even if such placements do further desirable social attitudes, however, it would not justify a change in current practice. Here, Justice O'Connor's concern for the appearance of endorsement is strikingly rele-

223. *See supra* notes 110-112 and accompanying text (discussing Burnham v. Burnham, 208 Neb. 498, 503, 304 N.W.2d 58, 61-62 (1981), in which inclusion of moral and ethical values resulted in maternal loss of custody because of mother's adherence to religious beliefs court felt were not in best interests of child).

224. *See supra* notes 189-202 and accompanying text.

225. *See supra* notes 192-201 and accompanying text.

226. Allport developed the "intrinsic-extrinsic" distinction. *See* Allport, *supra* note 193, at 454. Batson and his colleagues employ the "quest" typology. *See* Batson, Naifeh & Pate, *supra* note 200, at 40; *supra* notes 200-201 and accompanying text. Wuthnow sees the key distinction in contemporary American religion to be its split, across denominational lines, into liberal and conservative camps. *See* R. Wuthnow, *supra* note 106, at 132-72.

227. For example, a state need not be neutral about the value of equal respect for all citizens and the value of rationality. *See generally* B. Ackerman, Social Justice in the Liberal State 15-17 (1980).

vant. A mechanical application of the test of secular purpose and effect might justify favoring some religions over others. This result, however, is starkly inconsistent with the almost universally accepted proposition that the religion clauses forbid government preference of one religion.[228] Even if a preference is expressed in categories that cut across denominational lines, government endorsement of certain types of religions as good and others as bad, or perhaps not as good, for society is inconsistent with the values behind the religion clauses.

This issue presents a fine illustration of the virtues of Justice O'Connor's non-endorsement test as an alternative, or supplement, to the *Lemon* standard. In advocating explicit approval of religions that teach toleration and other pro-social values, Joseph Mucci states that because decision-makers will silently take these values into account, open endorsement is a preferable option.[229] But Mucci (writing not of the first amendment, but of the freedom of religion clause of the Canadian Charter of Rights and Freedoms) ignores the social implications of open endorsement. It may be true that subtle religious preference will enter into custody decisions in any event, but explicit judicial approval of some religious sentiments as pro-social and non-endorsement or disparagement of others is so inconsistent with first amendment values that even a certain amount of hypocrisy seems preferable.

The rule that one system of transcendent values is not to be preferred over another, then, seems warranted. It is also probably inevitable that an exception will be maintained for extreme cases of demonstrable harm to a particular child,[230] but that exception should be invoked sparingly and with emphasis on the consequences of the particular decision, rather than the social impact of the religious doctrine or practice involved.

C. *May Courts Determine Which Parent Would Provide a Better Religious Upbringing?*

Establishment clause concerns are less troubling when both parents express allegiance to the same set of religious values. Because no choice need be made between competing religions, or between religion (however defined) and irreligion, the possibility of a perception of endorsement is greatly reduced. If a court limits its inquiry to easily ascertainable factors such as the proximity of parents to religious facilities,[231] no serious establishment clause problems exist; the court is merely accepting the values which the parents both agree should be conveyed to the child and

228. *See supra* note 108 and accompanying text.

229. *See supra* note 189 and accompanying text.

230. At present, exceptions are typically maintained for cases of demonstrable harm to a child. *See supra* notes 110-112 and accompanying text.

231. *See, e.g.*, T. v. H., 102 N.J. Super. 38, 40-42, 245 A.2d 221, 222-23 (N.J. Super. Ct. Ch. 1968) (father awarded custody of children when separation agreement specified Jewish upbringing of children and father was best able to provide same), *aff'd*, 110 N.J. Super. 8, 264 A.2d 244 (N.J. Super. Ct., A.D. 1970).

seeking to determine who is in a better position to convey them. This is merely deference to parental choice and therefore sufficiently secular in purpose and effect.

Care must be taken, however, to ensure that the court is not actually being asked to choose between religious philosophies. Parents may belong to the same denomination, but differ sharply on value questions; this difference may be reflected in frequency of church attendance or the rigor with which official church teaching is followed at home. In such a case, a court may be faced with what is actually a dispute between different "religions." Contrast the case in which both parents agree that the child should be raised in a certain religion, but only one plans to reside in a community with a church and school of the faith, with a case in which parents, both professing allegiance to a certain faith, disagree about how often a child should attend church or whether a child should enroll in a church-affiliated school.[232] A finding in the first scenario that one parent is more likely to provide a better religious environment for the child is a far more neutral statement than the same finding in the latter case. The latter case may present a choice between different religious conceptions. In addition, the second case also presents more clearly than the first the possibility that a court will be asked to make a decision as to what constitutes a "good" member of a certain religion. Such a determination presents severe problems under the non-entanglement prong of the *Lemon* test.[233] Thus, a court declaration of which parent is likely to provide a superior religious environment when both parents adhere to the same religion may be warranted in some cases but should be permitted only if great care is taken to ensure that, in fact, a particular case really does present this type of problem, rather than a clash of different religious conceptions sharing the same label.

D. *May Courts Limit the Religious Activity of Non-Custodial Parents During Visitation Periods?*

Limitation of the non-custodial parent's religious activity calls for analysis under the free exercise clause, rather than establishment clause. An order limiting religious activity during visitation will typically be justified by the value of stability and the need to prevent confusion in the

232. *Compare id.* (awarding custody to father based on proximity to religious facilities), *with* Applebaum v. Hames, 159 Ga. App. 552, 553-54, 284 S.E.2d 58, 59-60 (1981) (denying modification of custody award requested solely on basis of Jewish father's failure to provide children with level of religious training which Jewish mother felt appropriate) *and* Klaus v. Klaus, 509 S.W.2d 479, 482 (Mo. Ct. App. 1974) (failure to take child to church cannot be equated with failure to provide child with moral training).

233. The fundamental principle of the cases discussed, *see supra* notes 210-214 and accompanying text, is that a court may not decide which of two competing groups, philosophies or doctrines "truly" represents a particular religion and that this principle is a crucial part of the non-entanglement requirement. *See generally* L. Tribe, *supra* note 216, § 14-11, at 1231-42 (detailing development and importance of "doctrinal entanglement").

mind of the child,[234] or as furthering the custodial parent's right to control the child's religious education.[235] Neither of these goals seem to be invalid under the *Lemon* "purpose and effect" analysis, and the message conveyed by the policy also seems to be concern for the welfare of the child or the rights of the custodial parent rather than any religious endorsement by government.[236]

However, to condition regular contact with the non-custodial parent on some limitation of that parent's religious practice is obviously troubling. In applying free exercise analysis to this question, courts will consider the preservation of the best interests of the child to be a compelling government interest.[237] Thus, courts must turn to the degree of the restriction on the parent's rights and the question of whether the restriction is narrowly tailored to further the government's interests. In considering these restrictions, courts should distinguish three types of requirements: (a) that the non-custodial parent act to ensure that the child fulfill religious obligations in the faith in which the child is being raised; (b) that prohibit the non-custodial parent from involving the child in religious activity outside the home; and (c) that the non-custodial parent not discuss religion with the child and not expose the child to religion in the home or day-to-day life of the parent.

These three types of restrictions involve different levels of interference with free exercise rights. The first, typified by a requirement that the non-custodial parent drive the child to church and pick the child up after services,[238] does no more than require that the parent act with respect and consideration toward someone of a different faith. While it might be possible to hypothesize some sort of religious duty to refuse to cooperate in any way with another's education in the "wrong" religion, such a duty is inconsistent with the religious liberalism called for by the Constitution. This type of narrow restriction seems well-tailored to fulfill the legitimate purposes of the court's order in the child custody or adoption proceeding and seems to present little or no free exercise difficulty.

The second type of restriction requires more consideration. An order

234. *See, e.g.*, Bentley v. Bentley, 86 A.D.2d 926, 927, 448 N.Y.S.2d 559, 560 (1982) (finding actual evidence of harm to child from parents' conflicting religious beliefs); Morris v. Morris, 271 Pa. Super. 19, 34, 412 A.2d 139, 147 (1979) (restricting visiting parent from taking child on religious door to door solicitations).

235. *See, e.g.*, Pardue v. Pardue, 285 So.2d 552, 555 (La. Ct. App. 1973) (father must comply with custodial mother's desires on religious instruction for children in order to retain Sunday visitation rights); Chapman v. Chapman, 352 N.W.2d 437, 441 (Minn. Ct. App. 1984) (custodial parent's decisions on religion receive judicial deference unless decisions can be shown to endanger child's well-being).

236. *See supra* notes 186-188 and accompanying text; *supra* notes 195-199 and accompanying text; *see also* J. Goldstein, A. Freud & A. Solnit, *supra* note 32, at 7-8.

237. *See supra* notes 125-138 and accompanying text.

238. *See, e.g.*, Overman v. Overman, 497 N.E.2d 618, 619 (Ind. Ct. App. 1986) (non-custodial father required to transport child to and from catechism during visitation); *Chapman*, 352 N.W.2d at 441 (non-custodial parent must transport children to mass in compliance with custodial parent's wishes).

to refrain from taking the child to the non-custodial parent's church on weekends might, as a practical matter, impede the parent from fulfilling his or her own religious obligations. It is also possible that a parent might feel a positive religious duty to expose his or her child to the "true" religion.[239] As a result, these situations must be considered on a case-by-case basis. Courts should inquire into the specific facts of each case with special emphasis on the degree to which the restriction hinders the non-custodial parent, how offensive it is to the religious beliefs of the custodial parent and whether there is any evidence that the practice is having an adverse effect on the child. Particular care should be taken to determine whether the parents are sincerely attempting to maximize the welfare of all parties involved, or whether either parent is using religion in an attempt to "win" the child by making the child reject the other parent's faith.[240] As a general rule, these restrictions should be allowed less freely than those discussed above, but more freely than those to be discussed in the following paragraphs.

The third type of restriction is the most troubling. To require that a parent refrain from normal, personal religious activity in the home[241] or from sharing that part of the parent's own personality with a child represents an unwarranted intrusion on the parent's religious rights. At the same time, exposure to the non-custodial parent's religion in this way educates the child about religious pluralism and reveals that even people the child loves will hold diverse views on religious subjects.

It would be unwise, however, to state an absolute rule that restrictions of this third type are always violations of free exercise rights. It is possible that parents could use in-home proselytizing as a weapon against the other parent, and court intervention in such a case might be permissible. In such cases, however, courts should uphold restrictions only when there is clear and concrete evidence that the non-custodial parent's behavior is harming the child.[242]

239. *See* Felton v. Felton, 383 Mass. 232, 238, 418 N.E.2d 606, 609 (1981).

240. *See generally* Lewis v. Lewis, 260 Ark. 691, 693, 543 S.W.2d 222, 223-24 (1976) (father's religious teachings aimed at instilling disrespect and disobedience to mother); Gamble v. Gamble, 477 P.2d 383, 388 (Okla. 1970) (father told son that mother was possessed by devil but still had unsupervised visitation privileges). As divorce itself becomes less dependent upon a finding of one party's fault, it may be that the psychological need to vent the anger and pain behind the divorce which once went into the trial of the issue of fault shifts to issues that are still the subject of dispute, including the legal and emotional control over children. "A custody battle places a child in many difficult roles: mediator, weapon, pawn, bargaining chip, trophy, go-between or even spy." Elster, *supra* note 4, at 24.

241. *See, e.g.*, Kadin v. Kadin, 131 A.D.2d 437, 440, 515 N.Y.S.2d 868, 870 (1987) (non-custodial father need not allow children visiting on sabbath to speak with mother by telephone in violation of father's religious beliefs); Morris v. Morris, 271 Pa. Super. 19, 34-35, 412 A.2d 139, 147 (1979) (non-custodial parent prohibited from taking child on door-to-door religious solicitation but could discuss his beliefs with child during visitation).

242. *See* Bentley v. Bentley, 86 A.D.2d 926, 927, 448 N.Y.S.2d 559, 560 (1982).

E. *May the Religion of Prospective Parents Be a Factor in Adoption Proceedings?*

For the most part, the same concerns and conclusions present in the discussion of religion in child custody proceedings will be present in adoption proceedings.[243] One additional factor in adoption cases, however, is the presence of matching statutes in the adoption laws of some states.[244]

Where the child in question has formed some sense of religious identity, matching statutes present the least trouble. Placement, where practicable, with parents who will continue to nurture this identity protects the child's interests, whether defined as an interest in stability or an interest in free exercise.[245] Where the child has no such identity, the question is more difficult. These cases can be divided into instances in which the birth parents have indicated a desire that the child be raised in a particular religion and those in which they have not.

Where parents have indicated such a desire, respect for those wishes can be seen as mere deference to parental choice, rather than the decision of the state concerning the value of a particular religion. While it is unlikely that the biological parents have a free exercise right to such state deference,[246] as long as it is, in fact, deference to private preference rather than imposition of a state decision, there is little threat of it being perceived as an illegitimate endorsement of religion. At least one court has found that in *Lemon*-based terms, permitting biological parents to have some say in the adoption process may reduce the trauma of giving up a child and encourage "the adoption of potentially disadvantaged children."[247] Such legitimate secular purposes and effects validate the use of matching statutes in these cases.

Finally, what if the biological parent has expressed no preference, but a statute is invoked to match the child with a family of the religious background imputed to the child? Some commentators have concluded that the practice of religious matching in these instances violates the establishment clause.[248] The factors of deference to parental choice or promotion of the welfare of the child are not present here, and their absence

243. *See supra* notes 216-223 and accompanying text.

244. *See supra* notes 143-150 and accompanying text.

245. Many matching statutes require matching "where practicable," which has allowed the statutes to withstand establishment and free exercise clause challenges. *See supra* notes 143-146 and accompanying text.

246. The first step in analysis of a free exercise claim is to question whether government would substantially impair the claimant's religious practice unless the claim is recognized. *See supra* notes 88-105 and accompanying text. A parent giving a child up for adoption would have to prove that the parent's own free exercise was substantially impaired by the fact that his or her child was being raised in another religion. *See In re* Efrain C., 63 Misc. 2d 1019, 1027, 314 N.Y.S.2d 255, 264 (N.Y. Fam. Ct. 1970) (parental right to control child's religion depends upon continuing parental relationship).

247. Note, *supra* note 147, at 566 (discussing unpublished opinion, Easton v. Angus, No. C084-1061W (D. Utah June 13, 1985).

248. *See* Ramsey, *supra* note 148, at 680-81; Comment, *A Reconsideration of the Reli-*

supports the conclusion that religious matching schemes in which the state chooses the child's religion is unconstitutional. One additional factor, however, must be considered before endorsing such a conclusion.

Where a child would have been raised within the traditions of a distinct minority religion, might religious matching serve the purpose of preserving religious and cultural diversity?[249] There is little constitutional authority for the claim that the religious community has any sort of free exercise right to retain "its" children.[250] The secular effect sought and obtained by government policies, however, need not limit the government to acts that they are compelled to take under constitutional duress. If the state were to engage in religious matching of dominant religious groups, in the absence of express preferences of the child or biological parents, the perceived effect would be to entrench religious majorities. Such a practice would fail both the *Lemon* test and the nonendorsement test. Were religious matching of children born into minority religious communities considered an absolute requirement, so that otherwise beneficial adoption would not take place, the deference to the continuation of religious diversity might be seen as undue endorsement of religion. But where, as in the case of all states employing religious matching, it does not override other clear "best interests" factors and where it is employed only on behalf of religions whose minority status makes it unlikely that state action to preserve them will be seen as endorsement for their beliefs over those of any other group, religious matching serves interests perfectly consistent with the secular values of maintaining diversity in a liberal democratic society.

Arguments that religious matching statutes are unconstitutional as lacking legitimate secular purposes and effects fail in several types of cases. Where a child already has developed a religious identity, where the biological parent has indicated a clear preference with respect to religion, or where the child comes from a distinct minority religious community, use of religion as one factor does not pose a serious threat to establishment clause values.[251]

CONCLUSION

Both the unreflective use of religion as a positive factor in custody disputes and adoption proceedings and the contention that the establishment clause precludes use of religious factors are unwarranted. Much of

gious Element in Adoption, 56 Cornell L. Rev. 780, 812-13 (1971); Note, *supra* note 147, at 559-60.

249. For a discussion of the role of adoption in threatening minority cultures in another context, see McCartney, *The American Indian Child Welfare Crisis: Cultural Genocide or First Amendment Protection*, 7 Colum. Hum. Rts. L. Rev. 529, 551 (1975) ("The separation of American Indian children from their families and the coerced assimilation into the dominant society destroys the American Indian way of life and the culture which is woven into that life.").

250. *See* Wisconsin v. Yoder, 406 U.S. 205, 237-41 (1972) (White, J., concurring).

251. *See supra* notes 203-215 & 245-250 and accompanying text.

the confusion in this area flows from inadequate, narrow views of what religion is. If religion is defined as traditional theism, found almost invariably in familiar denomination, much of the traditional deference to religion in the law of child custody does pose serious constitutional problems.

But under a broader view, in which traditional theism is only one of many expressions of religion, consideration of religion as a positive factor violates neither the *Lemon* test, nor the principle of non-endorsement of religion. Courts have been sensitive to two crucial principles: first, that except in the most exceptional cases, comparative judgments between religions must be avoided; and second, that religion may only be one factor of many in the analysis of the best interests of the child. With these two principles in place and with a proper conception of religion, religion may constitutionally be used in child custody and adoption decisions.