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The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interest Equation

The paramount consideration in child custody disputes is the "best interest" of the child. Statutes providing for judicial determination of custody generally allow judges great discretion in deciding what is in the child's best interest. Some statutes fail to provide the judge with guidelines for exercising this discretion, while others list factors that the judge must consider in determining the child's best interest. Only six statutes include religion as a factor to be considered in awarding custody. Many judges, however, factor religion into their evaluation of the child's best interest.

This Note examines when judges deciding custody disputes may consider potential custodians' religious practices without violating the establishment clause of the first amendment to the Constitution.


5. See note 20 infra and accompanying text.

6. The first amendment to the Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. This amendment applies to the states through the fourteenth amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). It applies to judicial as well as legislative actions. NAACP v. Alabama, 357 U.S. 449, 463 (1958). The two religion clauses contained in the first amendment, the establishment clause and the free exercise clause, are separate but related requirements which are at times in tension. The Court has stated that it repeatedly has recognized that tension inevitably exists between the Free Exercise and the Establishment Clauses . . . and that it may often not be possible to promote the former without offending the latter. As a result of this tension, our cases require the State to maintain an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion.

Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 788 (1973); see also Cantwell v. Connecticut, 310 U.S. at 303-04 (double aspect of the first amendment both prevents legal compulsion to accept any form of worship and safeguards the free exercise of the chosen form of religion). This Note examines the requirements of the establishment clause in the context of child custody disputes. See Mangrum, Exclusive Reliance on Best Interest May Be Unconstitutional: Religion As a Factor in Child Custody Cases, 15 CREIGHTON L. REV. 25 (1981), for an analysis of the free exercise clause in this context.

Although courts agree that they may not prefer one parent to another for religious reasons when both parents are religious and neither parent's religious practices threaten the child's health or safety, some courts believe that they may constitutionally prefer a religious parent to a nonreligious parent. Part I argues that courts violate the establishment clause by preferring religion to nonreligion when there is no showing that the child has personal religious convictions. Part II distinguishes such cases from those involving a child with a sincere preference for or against religion. It concludes that courts may constitutionally consider religion in custody disputes over children with personal convictions about religion.

I. CONSIDERING RELIGION WHEN THE CHILD HAS NO RELIGIOUS CONVICTIONS

Courts deciding child custody cases consistently refuse to choose between parents of different faiths on the basis of religion. Under

School Dist. of Abington Township v. Schempp, 374 U.S. 203, 217 (1963) (the primary purpose of the first amendment is “to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion” (quoting Everson v. Board of Educ., 330 U.S. at 32)); Kurland, The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court, 24 Vill. L. Rev. 3, 13 (1978) (same). The Supreme Court has recognized, however, that while separation is the ideal, “[s]ome relationship between government and religious organizations is inevitable.” Lynch v. Donnelly, 104 S. Ct. at 1358 (quoting Lemon v. Kurtzman, 403 U.S. at 614). Thus, “[i]n every Establishment Clause case, we must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that . . . total separation of the two is not possible.” 104 S. Ct. at 1358-59.

In addition to separation, a goal of the establishment clause is governmental neutrality towards religion. See Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968), where the Supreme Court explained that government “must be neutral in matters of religious theory, doctrine and practice. It may not be hostile to any religion, or to the advocacy of no-religion, and it may not aid, foster, or promote one religion . . . against another . . . . The first amendment mandates governmental neutrality between religion and nonreligion.” See also Lynch v. Donnelly, 104 S. Ct. at 1359 (Constitution “forbids hostility toward any” religion); Everson, 330 U.S. at 18 (states may neither handicap nor favor religions).

The establishment clause goals of separation and neutrality promote several important interests. First, they protect individual autonomy in making choices about religious matters. See Marsh v. Chambers, 103 S. Ct. at 3341 (Brennan, J., dissenting); Choper, The Establishment Clause and Aid to Parochial Schools, 56 Calif. L. Rev. 260, 267 (1968); Sky, The Establishment Clause, The Congress and the Schools: An Historical Perspective, 52 Va. L. Rev. 1395, 1422-23 (1966). Second, separation and neutrality protect religious institutions from governmental interference. They also “prevent the trivialization and degradation of religion by too close an attachment to the organs of government.” Marsh, 103 S. Ct. at 3342 (Brennan, J., dissenting); see also Engel v. Vitale, 370 U.S. 421, 431 (1962) (“[A] union of government and religion tends to destroy government and to degrade religion.”); Everson, 330 U.S. at 15. Finally, the separation and neutrality requirements “help assure that essentially religious issues, precisely because of their importance and sensitivity, do not become the occasion for battle in the political arena.” Marsh, 103 S. Ct. at 3342 (Brennan, J., dissenting).

7. A sincere preference for no religion at all should be regarded as a sincere belief. See notes 22, 81, 93, 96 infra and accompanying text.

the establishment clause,\textsuperscript{9} laws granting denominational preferences are regarded as suspect and are subject to strict scrutiny.\textsuperscript{10} They may be justified only by a compelling governmental interest and must be narrowly drawn to further that interest.\textsuperscript{11} Thus, the establishment clause generally prohibits courts deciding custody disputes from choosing between religious\textsuperscript{12} parents on the grounds of religion. This rule applies even when one parent follows an unconventional or unpopular religion.\textsuperscript{13}

\textsuperscript{9} State action preferring one religion to another potentially violates both religion clauses of the first amendment. When a court favors one parent over another for religious reasons, this implicates the disfavored parent's right to the free exercise of her religion, \textit{In re Marriage of Hadeen}, 27 Wash. App. 566, 619 P.2d 374, 382 (1980).

\textsuperscript{10} Larson v. Valente, 456 U.S. 228, 246 (1982). But see Lynch v. Donnelly, 104 S. Ct. 1355 (1984), where the Supreme Court refused to apply strict scrutiny to analyze the presence of a publicly owned crèche in the midst of a Christmas display in a park in Pawtucket, Rhode Island. The Court did not reject strict scrutiny generally, stating that it was applicable to a "statute or practice patently discriminatory on its face." However, the Court was "unable to see this display, or any part of it, as explicitly discriminatory in the sense contemplated in \textit{Larson}." 104 S. Ct. at 1366 n.13. The Court of Appeals had viewed the city's ownership of the $200 crèche as a discrimination between Christian and other religions and had therefore subjected it to strict scrutiny. The dissent agreed with this approach, noting that the majority had brushed "the point aside with little explanation." 104 S. Ct. at 1375 n.11 (Brennan, J., dissenting).

The \textit{Lynch} majority appears to have been influenced by the fact that the monetary value and upkeeping costs of the crèche were minimal, and by their view of the crèche as a passive symbol adding little to the character of the Christmas celebration. The Court argued that the "traditional, purely secular displays extant at Christmas, with or without the crèche, would inevitably recall the religious nature of the Holiday." It concluded that if including the crèche "violates the Establishment Clause, a host of other forms of taking official note of Christmas, and most of our religious heritage, are equally offensive to the Constitution." 104 S. Ct. at 1365. Given the peculiar facts of \textit{Lynch}, it appears safe to conclude that in the child custody context the Court would employ the strict scrutiny analysis generally applicable to denominational preference laws.

\textsuperscript{11} Larson v. Valente, 456 U.S. 228, 247 (1982). In \textit{Larson}, the Supreme Court considered a Minnesota law giving certain preferences to religious organizations receiving "more than half of their total contributions from members or affiliated organizations." 456 U.S. at 232. The Court stated that the law granted denominational preferences "of the sort consistently and firmly deprecated in our precedents." 456 U.S. at 246. Thus, it could only be justified if it served a compelling governmental interest and was "closely fitted to further that interest." 456 U.S. at 247. The Court, assuming \textit{arguendo} that the governmental interest served was compelling, found that the law was not narrowly tailored to this interest. 456 U.S. at 248-49.

\textsuperscript{12} This Note defines "religious" as courts generally do in child custody cases. The term usually is used to refer to some formal observance of the practices of an organized religion. Courts often consider church attendance and sending a child to Sunday school in deciding whether or not a potential custodian's home is appropriately "religious." \textit{See}, e.g., the cases cited at notes 20, 28-32 infra.

\textsuperscript{13} Courts generally agree that in most cases "the unconventionality or unpopularity of the applicant's religion may not be considered in fixing custody." Fife, \textit{Religion in the Upbringing of Children}, 35 B.U. L. Rev. 333, 366 (1955). For examples of courts awarding custody to parents following unconventional and perhaps unpopular religions, see note 18 infra.
There is an exception to this rule, however, when one parent's religious practices threaten the child's temporal health or physical safety. As the state has a compelling interest in protecting children, the establishment clause does not bar the court from considering religion in such cases. The court's inquiry into a parent's religion, however, should be limited. The inquiry should focus on the parent's religious practices. The court may also consider the parent's beliefs, but only to the extent that those beliefs may be probative of her religious practices. However, the court should not focus on the official doctrines of the church. Additionally, parental religion should be examined only to determine whether it will adversely affect the child's health or safety.

14. A child's "temporal health" includes his physical, mental and moral but not spiritual well-being. Courts use the term "temporal" to refer to secular concerns, and to distinguish them from religious or spiritual matters such as the child's eternal salvation or general relation to a Supreme Being. See The American Heritage Dictionary 1325 (New College ed. 1980) (defining "temporal" as "civil, secular, or lay, as distinguished from ecclesiastical"); BLACK'S LAW DICTIONARY 1256 (5th ed. 1979) (defining "spiritual" as "[r)elating to religious or ecclesiastical persons or affairs, as distinguished from 'secular' or lay, worldly or business matters"). See also 66 A.L.R.2d 1410, 1414 (1959); List, A Child and a Wall: A Study of "Religious Protection" Laws, 13 BUFFALO L. REV. 9, 15-16, 56-57 (1963-64). Generally, American courts emphasize temporal welfare, as they cannot constitutionally or realistically attempt to determine spiritual welfare. By forbidding the government from entering "the business of the churches," the first amendment reflects the judgment that ecclesiastics, not judges, should promote spiritual well-being. List, supra at 56-57.


17. This limitation on the court's inquiry comes in part from the free exercise clause cases that state that while the law may not interfere with a person's religious beliefs, it may interfere with the practices of those beliefs under certain circumstances. See Bob Jones Univ. v. United States, 103 S. Ct. 2017 (1983); United States v. Lee, 455 U.S. 252 (1982); Reynolds v. United States, 98 U.S. 145 (1878); Harris v. Harris, 343 So.2d 762, 764 (Miss. 1977). This limitation also comes from the line of cases that state that the court must avoid delving into questions of religious doctrine. See note 49 infra. Mere inquiry into parents' religious practices and even into their individual beliefs as they affect practices does not require the court to evaluate or define official church doctrine. The goal of the inquiry is to determine the parents' likely practices by looking at their personal religious beliefs when necessary. Evaluation of these practices is acceptable because of the State's compelling interest in protecting children. See note 15 infra and accompanying text.

18. Courts will not award custody to a parent whose religious practices will harm the child, but they disagree on the certainty and amount of harm that must be shown. Generally, the courts require a factual showing of either actual or likely jeopardy to the child's temporal mental health or physical safety. See, e.g., In re Marriage of Hadeen, 27 Wash. App. 566, 619 P.2d 374, 382 (1980). Some cases suggest that it is almost impossible to show harm from a religious practice. In Quiner v. Quiner, 59 Cal. Rptr. 503 (Cal. Ct. App. 1967), the appellate court reversed the trial court and gave custody to the mother, a member of a Christian sect called the "Exclusive Brethren." The sect discouraged or banned reading of anything but the Bible. Its doctrine of "separation" from nonmembers meant that the child would be taught that his father was unclean and that he could not associate with him. The mother had also testified that she would "separate" from her son if he became disobedient. Despite this evidence, the appellate court awarded the mother custody because there was no showing of actual
Although the courts generally refuse to prefer one religion to another, many of these same courts favor religious parents over non-religious parents in their custody decisions. This preference for

impairment of the child's well-being. It was not enough that the evidence indicated a "probability of psychological impact." 59 Cal. Rptr. at 518.

In In re Marriage of Hadeen, the appellate court found "substantial evidence to support the finding that Mrs. Hadeen's first fidelity is to the church, even to the extent of rejecting her children." 619 P.2d at 382. There was also substantial evidence that the mother would not allow the children to see their father if she were given custody, and that the children needed continued contact with both parents. Despite these findings, the appellate court remanded the case for a new trial because it was "likely that a determining factor here was the mother's involvement with her church." This was improper, as the trial court had not found that the mother's church membership "posed a threat to the mental or physical welfare of the children." 619 P.2d at 382.

However, in Burnham v. Burnham, 208 Neb. 498, 304 N.W.2d 58 (1981), the Nebraska Supreme Court considered one parent's religious practices to be potentially harmful and awarded custody to the other parent. The mother, a Fatima Crusader, believed the child was illegitimate because she and her husband were not married in the Fatima Crusader Church. The mother said she would cut the child out of her life if she disobeyed the rules of the church. The mother planned to send the child to a church school that required a release giving it full permission to use corporal punishment and relieving it of all responsibility for injuries to students.

19. The courts must limit their examination of parental religious practices to determining the impact of the practices on the child. These governmental judgments of religious merit are only justified by the compelling interest in protecting children's health and safety. See notes 8-16 supra and accompanying text.

20. Many courts have held that they may consider the extent of religious commitment in determining what is in the child's best interest, though they may not prefer one religion to another. For example, in Schreifels v. Schreifels, 47 Wash. 2d 409, 289 P.2d 1001 (1955), the court stated that it would not base custody on a parent's choice to bring the child up in a religion different from that of the other parent. "But here, the children are not being given religious training in any denomination and that fact should be considered .... " 47 Wash. 2d at 416, 287 P.2d at 1005. This favorable treatment for religiousness is in contrast to both the dicta in Schreifels itself and to Washington cases that have refused to prefer one religion to another. See, e.g., Munoz v. Munoz, 79 Wash. 2d 810, 489 P.2d 1133 (1971). The Missouri cases also contain this dichotomy. Compare Waite v. Waite, 567 S.W.2d 326, 332 (Mo. 1978) (court may not prefer one religion to another, but it may consider the child's religious training "in the defense of a challenged custodial parent"), with In re M.D.H., 595 S.W.2d 448, 450 (Mo. Ct. App. 1980) (court may base its custody determination on respondents' steady church affiliation, as this relates to the child's best interest). The courts of other states also draw this distinction between favoring one religion over another and favoring religion in general. See, e.g., Allison v. Ovens, 4 Ariz. App. 406, 421 P.2d 929, 935 (although court may not choose between religions, it may consider "the church and Sunday school habits of the children and their respective parents"), vacated in part on other grounds, 102 Ariz. 520, 433 P.2d 968 (1967), cert. denied, 390 U.S. 988 (1967); Provenca v. Provenca, 122 N.H. 793, 799, 451 A.2d 374, 378 (1982) (religion as it relates to the "concerns and temporal welfare" of the child is a proper subject of inquiry); Dean v. Dean, 32 N.C. App. 482, 232 S.E.2d 470 (1977) (while court may not prefer one faith to another, it may consider mother's failure to take child to church). While refusing to evaluate or weigh the intrinsic truth of different religious beliefs, the Pennsylvania courts consistently consider "spiritual well-being" to be part of the best interest equation. See, e.g., In re Custody of J.S.S., 298 Pa. Super. 428, 444 A.2d 1251 (1982); Morris v. Morris, 271 Pa. Super. 19, 412 A.2d 139, 142 (1979); see also Anhalt v. Fesler, 6 Kan. App. 2d 921, 636 P.2d 224, 225 (1981) (religion and church attendance are "not alone sufficient to determine the best interest of minor children," but are "factors to be considered"); T. v. H., 102 N.J. Super. 38, 245 A.2d 221 (1968) (factoring religious training into the determination of the child's best interest), affd, 264 A.2d 244 (1970).

Courts in many states have not reported a custody dispute between a religious and nonreligious parent that discussed the issue of religious preference. However, when faced with a case
religiosity deserves close constitutional scrutiny. The Supreme Court has held repeatedly that the establishment clause bars the government from preferring religion to nonreligion. Moreover, the Court has consistently suggested that governmental preferences for religion in general are just as constitutionally suspect as governmental preferences between religions. Yet many courts deciding cases involving religious parents with different beliefs, they often have declared their inability to consider religion in broad terms, suggesting that these courts would refuse to prefer a religious to a nonreligious parent when faced with that choice. See Quiner v. Quiner, 59 Cal. Rptr. 503, 516-17 (Cal. Ct. App. 1967); Cory v. Cory, 70 Cal. App. 563, 569-70, 161 P.2d 385, 389 (1945); Mollish v. Mollish, 494 S.W.2d 145, 152 (Tenn. Ct. App. 1972); Frantzen v. Frantzen, 349 S.W.2d 765, 767-68 (Tex. Civ. App. 1961); Salvaggio v. Barnett, 248 S.W.2d 244, 247 (Tex. Civ. App. 1952), cert. denied, 344 U.S. 879 (1952).

The Supreme Court then went on to analyze the preference under its special tripartite test used to determine whether a practice impermissibly aids religion over nonreligion. The philosophy is that the atheist or agnostic — the nonbeliever — is entitled to go his own way. Compare Corwin, The Supreme Court as National School Board, 14 LAW & CONTEMP. PROBS. 3, 9-10 (1949), and Freeman, The Misguided Search for the Constitutional Definition of "Religion", 71 GEO. L.J. 1519, 1520-24 (1983) (framers intended to allow laws which aid all religions) with L. Pfeffer, CHURCH, STATE, AND FREEDOM 154 (1967); A. Stokes & L. Pfeffer, CHURCH AND STATE IN THE UNITED STATES 98 (1964); Cahn, The "Establishment of Religion" Puzzle, 36 N.Y.U. L. REV. 1274, 1281 (1961); Kurland, supra note 6, at 9; and Sky, supra note 6, at 1403, 1417 (contra). Others feel that attempts to determine the framers' actual intent are doomed by the paucity of historical evidence and the multiplicity of plausible historical interpretations. See, e.g., School Dist. of Abington Township v. Schempp, 374 U.S. at 237-38 (Brennan, J., concurring); Choper, supra note 6, at 263 (1968). Moreover, some evidence suggests that the framers' actual intent cannot control modern interpretation of the establishment clause. The framers may have originally intended the establishment clause to prevent the federal government from interfering with the established state churches. Choper, The Religion Clauses of the First Amendment: Reconciling the Conflict, 41 U. PIT. L. REV. 673, 676 (1980). If so, after the establishment clause was applied to the states through the fourteenth amendment, this original intent was contradicted by what is now regarded as a central purpose of the first amendment — protection from state establishments. Id. at 676.

In Larson v. Valente, 456 U.S. 228 (1982), the Supreme Court first determined that a statutory denominational preference did not survive strict scrutiny analysis. See note 11 supra. The Court then went on to analyze the preference under its special tripartite test used to determine whether a practice impermissibly aids religion over nonreligion. See notes 23-25 infra and accompanying text. The Court noted that while application of the tripartite test was not "necessary to the disposition of the case before us, those tests do reflect the same concerns that warranted the application of strict scrutiny." 456 U.S. at 252. By applying both tests and stating that they reflected the same concerns, the Court strongly suggested that the establishment clause treats preferences for religion over nonreligion as harshly as it treats preferences...
today cases find the former permissible and the latter not.

The Supreme Court subjects laws arguably favoring religion over nonreligion to a special tripartite test. First articulated in *Lemon v. Kurtzman*, the test is an accumulation of criteria developed by the Court over the years. A law challenged as preferring religion to nonreligion must pass all three parts of the test to satisfy the restrictions of the establishment clause. The test requires: (1) that the statute have a secular legislative purpose; (2) that its principal or primary effect neither advance nor inhibit religion; and (3) that the statute not foster "an excessive government entanglement with religion." The constitutionality of the preference for religious over nonreligious parents in custody disputes should be analyzed under the *Lemon* test.

Between religions. For cases recognizing that courts may not prefer religious to nonreligious parents, see note 81 infra.


25. It should be noted that the Supreme Court did not apply the tripartite *Lemon* test in a recent establishment clause challenge to a governmental preference for religion over nonreligion. In *Marsh v. Chambers*, 103 S. Ct. 3330 (1983), the Court upheld the Nebraska legislature's practice of beginning each session with a prayer by a paid chaplain. The Court reasoned that the first Congress must not have intended the establishment clause to forbid the practice, as it passed legislation providing for paid chaplains in the House and Senate in the same week it approved the draft of the first amendment for submission to the States. The majority stated that this "unique history" led it to accept the view of the draftsmen of the first amendment that this practice of prayer posed no real threat to the establishment clause. 103 S. Ct. at 3335.

The unique historical analysis in *Marsh* would not apply in the context of child custody disputes. As Pfeffer states, the rare judge who can "put aside his own religious predilections when deciding a custody controversy would . . . more probably act in consonance with American traditions if he disregarded completely the devoutness or irreligion of the competing applicants." Pfeffer, *supra* note 13, at 366. Case law also reflects the lack of a tradition of favoring religion in child custody disputes. Some of the earliest cases discussing religion in child custody are among the most adamant in arguing that it should not be a factor. See *Hewitt v. Long*, 76 Ill. Rep. 399 (1875); *Fuller v. Fuller*, 249 Mich. 19, 20-21, 227 N.W. 541, 542 (1929); *Baker v. Bird*, 162 S.W. 119, 124 (Mo. 1913); *Rone v. Rone*, 20 S.W.2d 545 (Mo. Ct. App. 1929); *Kendall v. Williams*, 233 S.W. 296, 297-98 (Tex. Civ. App. 1921).

In *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984), although the Court applied the *Lemon* test, it did state its past and present unwillingness "to be confined to any single test or criterion in this sensitive area." 104 S. Ct. at 1362. The dissent was puzzled by the majority's dictum because "ever since its initial formulation, the *Lemon* test has been consistently looked upon as the fundamental tool of Establishment Clause analysis." 104 S. Ct. at 1371 n.2 (Brennan, J., dissenting). In fact, *Marsh* is the only case where the Court has not applied either the *Lemon* test or strict scrutiny. Brennan stated that he could "only conclude that with today's unsupported assertion, the Court hopes to provide a belated excuse for the failure in *Marsh* to address the analysis of the *Lemon* test." 104 S. Ct. at 1371 n.2. (Brennan, J., dissenting).

There is no reason to doubt that the *Lemon* test is the correct way to analyze preferences for religiousness in child custody cases. The test is firmly established, and the *Marsh* analysis does not apply to the present context. Most of the child custody cases discussed in this Note, however, were decided before the formulation of the *Lemon* test. Only one court to date has applied the *Lemon* test in a reported custody case. That court concluded that a preference for religion over nonreligion, when the child had expressed no mature religious preference, failed all three parts of the *Lemon* test. See *Bonjour v. Bonjour*, 592 P.2d 1233, 1244 (Alaska 1979).
A. Considering Religion Fails the Secular Purpose Requirement of the Establishment Clause

Courts differ on their announced reasons for considering a parent's religion in child custody disputes. Some say they do so to promote the child's spiritual welfare, while others claim they are promoting the child's temporal well-being. Still other courts simply refer approvingly to one parent's religiousness and plans for the child's religious training without explaining why they think this is important.

A number of courts consider a potential custodian's religion in order to enhance the child's spiritual well-being. By definition, however, attempts to enhance spiritual welfare serve a religious rather than a secular purpose. Thus, custody decisions considering a parent's religion solely for its effect on the child's spiritual welfare fail the secular purpose requirement of the Lemon test.

The claim that religion may be considered for its effects on a child's temporal well-being presents a more complex question. Many courts refer to the supposed causal connection between a parent's religion and her morality, or more generally, between a parent's religiousness and plans for the child's religious training without explaining why they think this is important.

26. See notes 29-30 infra and accompanying text.
27. See notes 31-33 infra and accompanying text.
30. See note 14 supra. Various commentators on the use of religion in adoption have noted the religious nature of "spiritual well-being." Imputing a religion to a child up for adoption "cannot be justified on the theory that the child's spiritual welfare will best be promoted by one religion rather than another or by any religion rather than none, for '[t]he law does not profess to know what is a right belief. . . . [E]nhancing the child's spiritual well-being is religious in nature, not secular." Comment, A Reconsideration of the Religious Element in Adoption, 56 Cornell L. Rev. 780, 814, 818 (1971); see also List, supra note 14, at 15; Note, Religion as a Factor in Adoption, Guardianship and Custody, 54 Colum. L. Rev. 376, 395 (1954).
31. Some courts equate being religious with being a good person. They presume that religion is identical to or at least an indication of worthiness, reputability and morality. See Vanover v. Hunley, 309 Ky. 461, 462-65, 218 S.W.2d 20, 21-22 (1949); Meyer v. Hackler, 219
religion and a good home life for the child. In this way, courts link religion to valid secular concerns - the moral and ethical beliefs and behavior of potential custodians, and the effects these will have on the child.

Other courts, however, have rejected the supposed correlation between religion and morality, or between religion and a good home environment. One court went so far as to say that "numerous profound thinkers have fixed convictions that all religion is bad, particularly so in the rearing of children." Legal scholars have argued that a religious atmosphere is an attribute of the good home that every child needs. They also believe that a parent's provision for the child's religious education may indicate that the parent is concerned about the moral climate in which the child is being reared. See Allison v. Ovens, 4 Ariz. App. 496, 421 P.2d 929, 934-35, vacated in part on other grounds, 102 Ariz. 520, 433 P.2d 968 (1967), cert. denied, 390 U.S. 988 (1968); Painter v. Bannister, 258 Iowa 1390, 1395-96, 140 N.W.2d 152, 155-56 (1966); Commonwealth ex rel. Bendrick v. White, 403 Pa. 55, 62, 169 A.2d 69, 73 (1961).

Secular morality is a legitimate governmental concern. See Paris Adult Theatre v. Slaton, 413 U.S. 49, 61 (1973) (a legislature may "legitimately act . . . to protect the social interest in order and morality" (citation omitted)); Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1202 (E.D. Va. 1975), affd, 425 U.S. 901 (1976) (state may regulate to promote morality and decency). Thus, it is permissible for a judge to consider the moral fitness of the potential custodians in child custody cases. For examples of custody statutes and cases considering morality, see note 52 infra. In an example from the analogous context of adoption, the New Jersey court considered the religious beliefs of potential parents to be evidence of their ethical and moral character. In re Adoption of "E", 59 N.J. 36, 58-59, 279 A.2d 785, 797 (1971). As a result, the court held that questions concerning religion as it bears on ethics and morals were permissible, as they would serve the secular purpose of indicating "moral fitness to adopt in relation to how the applicants will conduct themselves as adopting parents." 59 N.J. at 796. The court also held, however, that religion could not be the sole consideration used in making the adoption decision, as this would serve only a religious and not a secular purpose. See also note 41 infra.

See Welker v. Welker, 24 Wis. 2d 570, 573-77, 129 N.W.2d 134, 136-38 (1964), where the Wisconsin Supreme Court held that the establishment clause barred the trial court from considering the mother's agnosticism, as her beliefs posed no threat to the child. Although the dissent stated that "[m]orality, character and the dignity of human nature depends upon spiritual values and the recognition of a deity," 24 Wis. 2d at 579, 129 N.W.2d at 140, the majority held that it was "legally untenable" to equate the mother's "skepticism with a lack of morals." 24 Wis. 2d at 577, 129 N.W.2d at 138; see also In re Adoption of "E," 59 N.J. 36, 58-59, 279 A.2d 785, 797 (Weintraub, J., concurring) (arguing that inquiry into religion was "irrelevant to the true issue" of moral character and not a "proper concern of a terrestrial judge"); Wilson v. Wilson, 473 P.2d 595, 599 (Wyo. 1970) ("We know of no standard set by any of the courts as to how much religion must be practised by a parent before such parent can be considered a proper person to have custody of children.").

See Klaff, The Tender Years Doctrine: A Defense, 70 Calif. L. Rev. 335, 351 n.81 (1982) ("There is no known coincidence between good parenting or healthy child development and particular religious beliefs or practices . . . . [t]he general rule is that a parent cannot be denied custody solely because of his or her religion or the lack thereof."). The importance of religion to a child's development has been addressed most frequently in the adoption context. In placing children, courts often attempt to match the religion of the child, regardless of that child's age, with that of the adoptive parents. See Note, Religious Matching Statutes and Adoption, 51 N.Y.U. L. Rev. 262 (1976). Commentators addressing this issue often cite sociological studies that challenge the assumption that religion is an important attribute of a good custodian or good home life. See Broeder & Barrett, Impact of Religious Factors in Nebraska Adop-
and sociologists have also disputed the existence of any

37. See, e.g., B. RUSSELL, What is an Agnostic?, in The Basic Writings of Bertrand Russell 578 (R. Egner & L. Denon eds. 1961):

[As a statistical fact, Agnostics are not more prone to murder than other people; in fact, rather less so. They have the same motives for abstaining from murder as other people have... A man's anti-social wishes may be restrained by a wish to please God, but they may also be restrained by a wish to please his friends, or to win the respect of his community, or to be able to contemplate himself without disgust. But if he has no such wishes, the mere abstract precepts of morality will not keep him straight.

Russell argues that Christianity does not have a monopoly on the system of ethics with which it is now identified. Id. at 579.

correlation between religion and the secular concerns relevant to custody determinations.

Although there is sharp disagreement about the existence of a correlation between religion and morality, there is general agreement that morality can exist outside of religion. The Supreme Court has stated its view that a person without a traditional religious affiliation may have as strong a moral code as a person with such traditional beliefs. Other authorities, following this reasoning, have found that nonreligious parents can be morally desirable custodians. Thus, since morality can exist in the absence of religion, any

39. Welsh v. United States, 398 U.S. 333, 340 (1970). The Court held that in order to qualify for conscientious objector status, the applicant's opposition to war must "stem from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions." The Court thought that if an individual "deeply and sincerely holds beliefs that are purely ethical and moral in source and content . . . those beliefs certainly occupy in the life of that individual 'a place parallel to that filled by . . . God' in traditionally religious persons." 398 U.S. at 340. Justice Harlan, concurring, stated that "[c]ommon experience teaches that among 'religious' individuals some are weak and others strong adherents to tenets and this is no less true of individuals whose lives are guided by personal ethical considerations." 398 U.S. at 358-59. Harlan then went on to make a comment that is particularly relevant to the custody situation. "It goes without saying that the First Amendment is perforce a guarantee that the conscience of religion may not be preferred simply because organized religious groups in general are more visible than the individual who practices morals and ethics on his own." 398 U.S. at 360 n.12; see also E. Ericson, AMERICAN FREEDOM AND THE RADICAL RIGHT 108 (1982) ("[C]larity and compassion are the very roots that nurture our moral experience and make us human. We need not look elsewhere to find the source of morality."); Freeman, supra note 21, at 1554-55 (stating that a moral code is separate from a religious belief system, and pointing to Bertrand Russell as a man who subscribed to a moral code while rejecting religion).

40. See Fuller v. Fuller, 249 Mich. 19, 20-21, 227 N.W. 541, 542 (1929) (retaining custody in the mother despite the fact that she did not send the child to Sunday School, noting that her "moral character was not attacked"); Rone v. Rone, 20 S.W.2d 545, 548 (Mo. Ct. App. 1929) (retaining custody in the mother even though she did not send the child to Sunday school, noting that she herself might have taught the child "the secrets of life and the ways of virtue and rectitude of conduct"); In re Glavas, 203 Misc. 590, 591, 121 N.Y.S.2d 12, 13-14 (N.Y. Dom. Rel. Ct. 1953) (in placing a child adjudged neglected, the judge stated in dictum his view that a child could be taught ethics without being given religious training); Kendall v. Williams, 233 S.W. 296, 297-98 (Tex. Civ. App. 1921) (refusing to weigh the relative religiousness of two sets of potential custodians, as they were all good people); H. Clark, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 589 (1968) ("It does not follow, however, that a person who does not have religious convictions cannot be a moral person or an affectionate and successful parent. A fortiori it does not follow that proof of weekly attendance at church
court that does not allow evidence of morality in a nonreligious parent to counter assumptions about the temporal value of religion would seem to be indicating a clearly impermissible concern with spiritual rather than temporal well-being.41

Even if religion were correlated with morality, and even if courts routinely allowed evidence of morality to outweigh any preference for a religious parent, a number of factors still suggest that courts may not consider a parent’s religion as proof of her morality. First, grave constitutional problems arise when discrimination is directed against a group because of a statistical correlation between group members and a particular characteristic. For example, the Supreme Court has struck down gender discrimination based on correlations between men and alcohol-related driving offenses, and between women and economic dependency.42 Although these decisions rest on

establishes one’s qualifications as a parent.”); Pfeffer, supra note 13, at 351 (“Certainly, there is no evidence that moral training or character development can be effected only by religious education . . . . “); Comment, supra note 30, at 815 (no evidence supports the view that “religion is a necessary criterion of morality”).

Conversely, it is also inappropriate to “stop the inquiry into moral fitness merely upon assurance that the applicants believe in a Supreme Being and attend church regularly. Such belief may well be inconclusive of the question.” In re Adoption of “E”, 59 N.J. 36, 49, 279 A.2d 785, 792 (1971); see also Hewitt v. Long, 76 Ill. 399, 402 (1875) (“It is unnecessary to say, that a woman may attend church, may teach in a Sabbath school, . . . and yet be wholly unfit to be the mistress over a girl . . . . “).

41. See In re Adoption of “E”, 59 N.J. 36, 49, 279 A.2d 785, 792 (1971), where the court found that considering religion as it bears on ethics and morals served a valid secular purpose. See note 33 supra. However, this secular purpose disappeared when the prospective parents were shown to be of “high moral character,” and the court refused to give their lack of religious beliefs any further consideration. As morality had been established, “the only purpose in requiring religious affiliation and belief in a Supreme Being can be religious.” 59 N.J. at 56, 279 A.2d at 796.

42. In Craig v. Boren, 429 U.S. 190 (1976), rehg. denied, 429 U.S. 1124 (1977), the Court struck down on equal protection grounds an Oklahoma statute prohibiting the sale of 3.2% beer to males under the age of 21 and females under the age of 18. The State offered evidence that 2% of males as compared to 0.18% of females aged 18-20 had been arrested for “alcohol-related driving offenses.” 429 U.S. at 201. Although the Court regarded this statistical disparity as minimal and was unimpressed by this evidence for that reason, the opinion cast doubt on the use of statistics generally to validate the use of a proxy when constitutional rights are at stake. “[P]rior cases have consistently rejected the use of sex as a decision making factor even though the statutes in question certainly rested on far more predictive empirical relationships than this.” 429 U.S. at 202. The Court gave as examples Frontiero v. Richardson, 411 U.S. 677 (1973), and Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), cases in which the Court found empirical evidence to be unsatisfactory in defense of “mandatory dependency tests for men but not for women . . . even though we recognized that husbands are still far less likely to be dependent on their wives than vice versa.” Craig, 429 U.S. at 202 n.13. The Court went on to say that “proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the equal protection clause.” 429 U.S. at 204. Thus, “even when state officials have posited sociological or empirical justifications for these gender-based distinctions, the courts have struck down discrimination.” 429 U.S. at 208. The very existence of such statistics makes the mandate of the equal protection clause all the more imperative. As the Court stated:

In fact, social science studies that have uncovered quantifiable differences in drinking tendencies dividing along both racial and ethnic lines strongly suggest the need for application of the Equal Protection Clause in preventing discriminatory treatment that almost certainly would be perceived as invidious. In sum, the principles embodied in the Equal
equal protection grounds, the Court's analysis of the role of statistics applies to the present context. The Court appears to view statistics as too potentially powerful a justification for discrimination against protected groups. Under present Supreme Court doctrine, discrimination against the nonreligious is treated even more strictly than gender discrimination. Since statistical correlations may not justify gender discrimination, they should not be allowed to justify religious discrimination.

The great variety among religions is another factor posing sub-

Protection Clause are not to be rendered inapplicable by statistically measured but loose fitting generalities.

429 U.S. at 298-99. Craig's suspicion of statistics seems to be based on the fear of allowing this kind of wedge to erode the protection afforded to traditionally discriminated against groups. In essence, the Court seems to be saying that it is normatively wrong and just too dangerous. 43 See note 42 supra.

44. The Supreme Court applies strict scrutiny to laws granting denominational preferences, and the Lemon test — a test reflecting the "same concerns" as strict scrutiny — to laws preferring religion to nonreligion. See notes 9-11, 22-24 supra and accompanying text. It applies only middle-level scrutiny, however, to laws that discriminate on the basis of sex. See Orr v. Orr, 440 U.S. 268, 279 (1979); Craig v. Boren, 429 U.S. 190, 197 (1976), rehg. denied, 429 U.S. 1124 (1977). Thus, while laws granting denominational preferences must be closely fitted to further compelling governmental interests, and laws preferring religion to nonreligion must pass all three prongs of the Lemon test, laws discriminating on the basis of sex survive constitutional scrutiny if they are "substantially related" to the achievement of "important governmental objectives." See Orr, 440 U.S. at 279; Craig, 429 U.S. at 197.

45. The Supreme Court's suspicion of statistics in Craig v. Boren, 429 U.S. 190 (1976), rehg. denied, 429 U.S. 1124 (1977), see note 42 supra, coupled with the higher level of scrutiny in the religious area, see note 44 supra, means that even if statistics showed that people of one or all religions were more moral it is unlikely that a court may constitutionally prefer one religion to another, or religion to nonreligion. Moreover, there are real dangers in allowing religion to be used as a proxy for morality in child custody cases. First, many courts have misused religion to promote spiritual rather than temporal goals. See notes 29-30 supra and accompanying text. Second, custody cases are particularly susceptible to abuse, as trial judges have wide discretion. See Gunter v. Gunter, 219 So. 2d 743 (Fla. Dist. Ct. App. 1969); see also Comment, Child Custody: Best Interests of Children vs. Constitutional Rights of Parents, 81 Dick. L. Rev. 733, 737 (1977) ("Since identifying 'good' parental behavior is at best a subjective process, a parent is victim to a particular judge's values and beliefs."). The concerns in these cases are not unlike those delineated by the Supreme Court in cases involving parochial school teachers of secular subjects. In commenting on the dangers that a religious teacher in a parochial school poses to the "separation of the religious from the purely secular aspects of pre-college education," the Court noted that it was not implying that teachers would act in bad faith but only that the "conflict of functions inheres in the situation." Lemon v. Kurtzman, 403 U.S. 602, 617 (1971).

Just as it is difficult for a religious teacher to remain religiously neutral, it is also difficult for a religious judge to do so. As the Court said of such teachers: "What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion." Lemon, 403 U.S. at 619. For a religious judge it may be hard to separate a religious home from a good home. As one commentator has noted, "there is perhaps no situation which has betrayed the judiciary to yield to its own religious preferences so subtly as the issue of parental abandonment in the face of rival religious claims between parents or relatives over some poor child who had been made the object of religious zeal." Friedman, The Parental Right to Control the Religious Education of a Child, 29 Harv. L. Rev. 485, 492 (1916), quoted in In re Vardinakis, 160 Misc. 13, 15, 289 N.Y.S. 355, 358 (N.Y. Dom. Rel. Ct. 1936). The Vardinakis court found it crucial for judges to guard against this "danger within [them]selves, frequently not consciously recognized" in order to reach a fair result. Vardinakis, 160 Misc. at 14-15, 289 N.Y.S. at 358.
stational problems for the use of religion as evidence of morality or a good home. Different religions and groups within the same religion emphasize different values. This diversity means that adherence to any one religion cannot be equivalent to adherence to any other religion in terms of the presumptive benefit to the child's temporal well-being. Yet courts simply assume that all religions teach the secular

46. This notion is well accepted. See N. TEETERS & J. REINEMANN, supra note 38, at 617 ("[T]he church is divided into various philosophic shades, running the gamut of unbending orthodoxy to humanism."); B. WILSON, supra note 38, at 37 ("Within dominant religious traditions, it is the rule rather than the exception that there are different denominations or sects . . . . Not unusually, these religious groups espouse divergent moral norms . . . . their operative schemes of morality may differ significantly . . . ."); Canavan, The Pluralist Game, 44 LAW & CONTEMP. PROBS., Spring 1981, at 23, 24-25; Smith, Weiger & Thomas, supra note 38, at 52; see also United States v. Ballard, 322 U.S. 78, 94 (1944) (Jackson, J., dissenting) ("Scores of sects flourish in this country by teaching what to me are queer notions. It is plain that there is wide variety in American religious taste.").

On many issues, liberal religious groups arguably hold more in common with secularists than with the conservatives within their own churches. See Hitchcock, Church, State, and Moral Values: The Limits of American Pluralism, 44 LAW & CONTEMP. PROBS., at 3, 5 (making this observation about homosexual rights and the "sexual revolution"); see also L. PFEFFER, God, Caesar, and the Constitution 20 (1975). Pfeffer observes that traditional Catholics, Fundamentalist Protestants and Orthodox Jews all hope for a world with "no divorce, no contraception, no abortion, no obscene books or pictures, [and] no homosexuality." In contrast, liberal Protestants, liberal Jews and deists seek freedom of thought and expression, recognize a woman's right to control her own body and endorse the sexual revolution. See also B. RUSSELL, supra note 37, at 580; Roof, Alienation and Apostasy, 15 SOCIETY, May-June 1978, at 41, 45.

47. See, e.g., TEETERS & REINEMANN, supra note 38, at 162 (studies of criminal activity show variations among members of different religious groups); Hadaway & Roof, supra note 38, at 304 (concluding that the relationship between religious beliefs and quality of life was "stronger among Catholics and fringe Christian groups than among Protestants," but finding a negative correlation between religion and quality of life for Jews).

The diversity in religious doctrine not only means that different religions can enhance a child's secular morality to different extents, but also that they can inflict varying degrees of damage on a child's morals. The Supreme Court has branded certain religious practices as immoral. See Cleveland v. United States, 329 U.S. 14 (1946) (upholding the conviction of members of a Mormon sect for practicing polygamy, as polygamy is an "immoral purpose" forbidden by the Mann Act). In Bob Jones Univ. v. United States, 103 S. Ct. 2017 (1983), the Court denied tax-exempt status to private schools that discriminated on the basis of race. Both schools involved in the case were dedicated to the teaching of Christian religious beliefs and endorsed the sexual revolution. See, e.g., Falwell, LISTEN, AMERICA— 53 (1981) ("If a person is not a Christian, he is inherently a failure."); J. Chick, Are Roman Catholics Christians? (1981) (concluding that they are not Christians "in any sense of the word" and are thus "very lost").

In addition to encouraging discrimination, religious groups can harm a child's secular morals in other ways. One recent paper argued that "many Christian denominations" as well as many of the new religious movements that have proliferated in North America since the late 1960's encourage among their adherents a reduced sense of moral accountability. Bird, The Pursuit of Innocence? New Religious Movements and Moral Accountability, 40 SOC. ANALYSIS 335 (1979). See also Wallis, Recruiting Christian Manpower, 15 SOCIETY, May-June 1978, at 72, for a discussion of religious groups that contravene traditional sexual morality. One Christian group, the Children of God, uses "the sexual attractiveness of young females as a means of recruiting new disciples and allies for the Children of God." This group believes that "those who are saved and completely commit their lives to God's service may dispense with moral
morals with which the courts are concerned.\textsuperscript{48} For courts honestly to consider parental religion for its secular worth, they should identify the secular values that are important in making a custody decision and require a factual showing that the religion embodies those values.

This suggested approach, however, runs into two serious problems. First, it requires courts to probe and resolve questions of religious doctrine, an activity that the Constitution forbids.\textsuperscript{49} Second, this approach results in court preferences for some religions over others based on the doctrines they espouse. This preference is unconstitutional unless the religious practices involved threaten the child’s health or safety.\textsuperscript{50}

regulation in favor of higher imperatives.” Wallis, \textit{supra} at 72-73. This discussion makes clear the difficulty of arguing that all forms of religious training necessarily benefit the child’s temporal well-being. Yet absent evidence of practices that threaten the child’s health or safety, all these religions must be treated with equal favor. \textit{See note 50 infra} and accompanying text.

\textsuperscript{48} \textit{See notes 31-32 supra} and accompanying text.

\textsuperscript{49} The Supreme Court has repeatedly held that the first amendment forbids courts from defining, weighing, deciding or judging questions of religious doctrine. See \textit{Presbyterian Church v. Hull Church}, 393 U.S. 440 (1969), where the Court held that the Georgia court had improperly adjudicated a property claim made by two local churches that had withdrawn from the general church hierarchy. The Georgia court had determined the right to the property by examining whether the general church had departed from its tenets of faith and violated its own moral and ethical code. The Supreme Court held that a civil court was not allowed to adjudicate the issue of the church’s moral and ethical standards. The Court said that the method Georgia had used to resolve the dispute required it to “determine matters at the very core of a religion — the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the first amendment forbids civil courts from playing such a role.” 393 U.S. at 450; \textit{see also} \textit{Serbian Eastern Orthodox Diocese v. Milivojevich}, 426 U.S. 696, 710 (1976), \textit{rehg. denied}, 429 U.S. 873 (“[The principle that courts decide] church property disputes without resolving controversies over religious doctrine . . . applies with equal force to church disputes over church polity and administration.”). For other Supreme Court cases stating that courts must avoid delving into questions of religious doctrine, see generally \textit{Bob Jones Univ. v. United States}, 103 S. Ct. 2017, 2035 n.30 (1983); \textit{Jones v. Wolf}, 443 U.S. 595, 602-10 (1979); \textit{Lemon v. Kurtzman}, 403 U.S. 602 (1971); \textit{Walz v. Tax Commn.}, 397 U.S. 664, 697 n.1 (1970) (opinion of Harlan, J.); \textit{Maryland & Virginia Churches v. Sharpburg Church}, 396 U.S. 367, 368-69 (1970) (Brennan, J., concurring); \textit{Kedroff v. Saint Nicholas Cathedral}, 344 U.S. 94, 116 (1952); \textit{Watson v. Jones}, 80 U.S. (13 Wall.) 679, 733-34 (1871). \textit{See also} \textit{NLRB v. Catholic Bishop}, 440 U.S. 490 (1979) (absent clear expression of congressional intent, National Labor Relations Act not to be construed as applying to teachers in church-operated schools); \textit{cf. State ex rel. Baker v. Bird}, 253 Mo. 569, 585, 162 S.W. 119, 124 (1913) (The state has an interest “in having all of its children reared in a good moral atmosphere . . . but [it] cannot, under our present [state] Constitution, undertake to decide what form of religious instruction is best for any person.”); \textit{L. PFEFFER, supra} note 21, at 288 (“The freedom and independence of churches would be in grave danger if the state undertook to define religious heresy or orthodoxy.”).

In the context of child custody disputes, it is easy to imagine a situation where one parent claims that her religion espouses certain moral principles. The other parent could then challenge this, either by saying that the parent had mischaracterized her religion’s doctrines or by claiming that she actually belonged to a congregation that had departed from the general church’s teachings. The court would then be faced with the type of question presented by a number of the preceding cases, and it would be unable to resolve the issue.

\textsuperscript{50} \textit{See notes 8-19 supra} and accompanying text. \textit{But see Wisconsin v. Yoder}, 406 U.S. 205 (1972). In \textit{Yoder}, the Court held that Amish children in Wisconsin did not have to attend school after the eighth grade, despite the state compulsory education laws that required atten-
There is a final problem with considering religion as evidence of morality or a good home life, even assuming that this inquiry has a valid secular purpose. It may be impermissible for a court to consider religion if there is another way to achieve the court's purpose that does not employ religious means. The establishment clause arguably bars practices that use religious means to achieve secular purposes when secular means to achieve the same objectives would suffice.\(^1\)

Courts deciding custody cases can look directly at the moral and

\(^{1}\) Before Lynch v. Donnelly, 104 S. Ct. 1355 (1984), it was clear that the establishment clause required the use of secular means when they were adequate to achieve secular purposes. See, e.g., Larkin v. Grendel's Den, Inc., 103 S. Ct. 505 (1982) (striking down a Massachusetts law giving churches and schools the right to veto liquor license applications from businesses within 500 feet of the church or school, since the valid secular purposes of the statute could be "readily accomplished by other means"); see also Walz v. Tax Commn., 397 U.S. 644, 680 (1970) (Brennan, J., concurring) (establishment clause forbids government use of essentially religious means to achieve secular purposes when secular means would achieve the same ends); McGowan v. Maryland, 366 U.S. 420, 450 (1961) (upholding Sunday closing laws, as they served secular purposes that could not be served by purely secular means).

However, the Supreme Court has recently turned its back on this requirement without explanation. In Lynch, the Court deemed "irrelevant" the argument that the City of Pawtucket could have achieved its secular purposes without displaying the crèche. 104 S. Ct. at 1363 n.7. In dissent, Justice Brennan found it puzzling, to say the least, that the Court today should find "irrelevant" . . . the fact that the City's secular objectives can be readily and fully accomplished without including the crèche, since only last Term in Larkin v. Grendel's Den . . . the Court relied upon precisely the same point in striking down a Massachusetts statute.
ethical beliefs and behavior of potential custodians. Moreover, it appears that courts could better predict the child’s moral development by focusing on the parents’ day-to-day conduct rather than on their church attendance or plans for the child’s religious training. Using religion to evaluate morals and ethics, then, serves no secular purpose that cannot be served by means “that would not even remotely or incidentally give state aid to religion.”

104 S. Ct. at 1372 n.4 (Brennan, J., dissenting).

Since the requirement that courts use secular means to achieve secular goals whenever possible was well established, the Court may well resurrect it in future cases. The requirement has a solid basis in the general rule that the state must regulate conduct in the public interest in a way that does not unnecessarily or unduly infringe on the first amendment religion provisions. See McGowan, 366 U.S. at 450; Cantwell v. Connecticut, 310 U.S. 296, 304-05 (1940); see also School Dist. of Abington Township v. Schempp, 374 U.S. 203, 265 n.29 (1963) (Brennan, J., concurring) (listing numerous cases to illustrate the principle that government must employ means that would least interfere with “the exercise of constitutional liberties” when first amendment freedoms are threatened).

Even if the Court fails to return to this requirement as a separate standard to be met, the fact that a court uses religion when it need not casts suspicion on that court’s purpose for considering religion. Justice Brennan observed in Lynch that two compelling aspects of this case indicate that our generally prudent “reluctance to attribute unconstitutional motives” to a governmental body . . . should be overcome. First, . . . all of Pawtucket’s “valid secular objectives can be readily accomplished by other means” . . . The inclusion of a distinctively religious element . . . demonstrates that a narrower sectarian purpose lay behind the decision to include a nativity scene. 104 S. Ct. at 1372-73 (Brennan, J., dissenting). See also Abington, 374 U.S. at 233, in which the state argued that beginning the school day with Bible readings promotes secular morality. The Court, however, struck down the practice. Writing separately, Justice Brennan stated that “[i]f the extent that only religious materials will serve this purpose, it seems to me that the purpose as well as the means is so plainly religious that the exercise is necessarily forbidden by the Establishment Clause.” 374 U.S. at 280 (emphasis deleted).

52. A number of statutes instruct the judge to consider the moral fitness of the respective parents without mentioning religion. See, e.g., Fla. Stat. Ann. § 61.13(3)(f) (Harrison Supp. 1983); Utah Code Ann. § 30-1-10 (Smith Supp. 1983). Others instruct the court to provide for the child’s moral welfare, also without including parental religion as a consideration in this decision. See, e.g., Ohio Rev. Code Ann. § 3109.04(B)(1)(c) (Anderson Supp. 1983). In addition, there are cases in which courts have looked at the morals of potential custodians but have not examined their religiousness. See, e.g., Hild v. Hild, 221 Md. 349, 157 A.2d 442 (1960).

53. See E. ERICSON, AMERICAN FREEDOM AND THE RADICAL RIGHT 103 (1982) (“[A]n atheist can be, and often is, as morally good as any believer. Being a person formed in a relationship of mutual caring and trust is more decisive in shaping character than moral indoctrination or theology.”); see also N. Teeters & J. Reinemann, supra note 38, at 163 (describing studies that indicate that parents, not religious leaders, are the strongest source “of personality influence and formation, especially so far as moral judgments are concerned”). These last authors described an unsuccessful attempt to teach children honesty and concluded:

[W]e have not yet devised any mechanical character-building program for young people to substitute for the day-to-day relationship between parents and their children. Home training is still of vital importance. A few hours each day spent in school and one or two hours per week spent in Sunday School . . . cannot offset the influence of a home where the moral tone is on a low level. Where home influences are good, the child will profit little in morality by participation in these organizations.

54. McGowan v. Maryland, 366 U.S. 420, 450 (1961); see also Comment, supra note 30, at 816: Although the moral development of a child is a secular purpose, and religious training may be one way of promoting this purpose, it clearly is not the only way. The same goal can be achieved by simply providing that adoptive parents meet the state’s moral quali-
A court preference for parental religiousness to promote the spiritual or temporal welfare of the child serves no valid secular purpose. Such a preference thus fails to satisfy the first part of the Lemon test. Even if it did, however, the preference would still have to meet the second and third parts; it must not have the principal or primary effect of advancing religion nor foster an excessive governmental entanglement with religion.

B. Favoring the Religious Parent Has the Principal and Primary Effect of Advancing Religion

Even if a practice serves a valid secular purpose that could not be achieved by secular means, it still violates the establishment clause if it has the principal or primary effect of advancing religion. An examination of the practical effects of preferring religious to nonreligious parents in custody disputes leads to the conclusion that the practice fails the second part of the Lemon test and also sheds some light on the real reason for the preference.

Despite its use of the words "principal or primary effect," the test is not necessarily satisfied by a showing that the "primary effect" of the preference is placing the child with the more moral parent. A preference that primarily serves legitimate ends is not "immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion." Under either phrasing of
the standard, choosing a custodian even partially because of his religiousness impermissibly advances religion.

Basing custody decisions on religion principally and primarily advances religion by violating the neutrality principle of the first amendment and putting the authority, influence, official support and coercive power of the state behind religion. As the Alaska Supreme Court stated in Bonjour v. Bonjour, "[t]he principal or primary effect of giving preference to parents who are members of an 'organized religious community' in child custody disputes will be to encourage nonreligious, anti-religious, or simply disinterested parents to engage in religious practices even if their beliefs are not sincere." The court concluded that the practice "goes beyond accommodation and benevolent neutrality towards religion." This

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58. See note 6 supra for a discussion of the principle of neutrality.

59. See Bonjour v. Bonjour, 592 P.2d 1233, 1243 (Alaska 1979) ("In short, it puts government on the side of organized religion, a non-secular result that the establishment clause is designed to prevent."); In re Adoption of "E", 59 N.J. 36, 58, 279 A.2d 785, 797 (1971) (Weintraub, C.J., concurring) ("Whether the price of the heresy is the destruction of a man's good character or merely a blot upon it, it is equally true that the State stamps its approval upon some tenets and its disapproval upon others. This is precisely what the First Amendment forbids."). For evidence that judicial preferences for religious parents amount to the state coercing people into professing religious beliefs, see note 61 infra and accompanying text.

60. 592 P.2d 1233, 1243 (Alaska 1979).

61. 592 P.2d at 1243. Other courts and commentators have also recognized that people will alter their religious behavior or at least lie about it in response to coercive pressure by the court awarding custody. For example, in People ex rel McGrath v. Gimler, 60 N.Y.S.2d 622, 627 (N.Y. Sup. Ct. 1946), affd mem., 270 A.D. 949, 62 N.Y.S.2d 846 (1946), the custody battle involved parents who had baptized their child as a Catholic. When the parents separated, the mother, a Lutheran, began to bring the child up in her own religion. The father claimed he would raise the child a Catholic. In the midst of the custody hearing "the child was, more or less hurriedly, introduced [by her mother] to the Catholic pastor in the neighborhood, entered in the parochial school there, and began to receive religious instruction." 60 N.Y.S.2d at 627. The judge expressed his belief that the mother's knowledge that the court would want the child
direct state support of religion is precisely what the establishment clause forbids.62

62. In re Adoption of "E", 59 N.J. 36, 58, 279 A.2d 785, 797 (1971) (Weintraub, C.J., concurring). See Widmar v. Vincent, 454 U.S. 263, 274 (1981); School Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963). The establishment clause is particularly opposed to state authority and support for religion that rises to the level of coercion. This is true even if one is only forced to profess some belief that one does not hold. See Torcaso v. Watkins, 367 U.S. 488, 494 (1961) (striking down a Maryland statute requiring people holding "offices of profit or trust" to declare their belief in the existence of God and stating that the state could not limit "public offices to persons who have, or perhaps more properly profess to have, a belief in some particular kind of religious concept") (emphasis added); Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947) (The government may not "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."). Though a coercive purpose or effect is not necessary to establish a violation of the establishment clause, it is sufficient. See Walz v. Tax Commn., 397 U.S. 664, 696 (1970) (opinion of Harlan, J.); School Dist. of Abington Township v. Schempp, 374 U.S. 203, 234 (1963) (Brennan, J., concurring); Engel v. Vitale, 370 U.S. 421, 429-30 (1962); McGowan v. Maryland, 366 U.S. 420, 452-53 (1961); Zorach v. Clauson, 343 U.S. 306, 314 (1952); Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203, 217 (1948) (Frankfurter, J., concurring); Comment, supra note 30, at 814 n.174.

But see Marsh v. Chambers, 103 S. Ct. 3330 (1983). Here the Court upheld the Nebraska legislature's practice of beginning each legislative session with a prayer. While there is an element of coercion here, the violation in no way involved children, for whom the Court has shown particular concern. See note 65 infra. Additionally, there is much less coercion placed on legislators by a prayer than there is on a parent who wants custody of his child and must attend church to get it.

Pretending religious parents in child custody cases put the power and prestige of the government behind religion and applies "indirect coercive pressure" on prospective custodians to conform to the judge's religious requirements. See notes 59-61 supra and accompanying text;
A judicial preference for religious parents also fails the second part of the *Lemon* test by directly and immediately advancing religion. While the practice *could* have the effect of aiding moral development in children, this secular effect is speculative. In contrast, the sectarian effect is direct and immediate. Thus, even if it were proved that the moral development was a primary effect, "a court would still be unlikely to classify the unquestionable aid to religion that these statutes provide as incidental."

Allowing religion to be a factor in custody disputes also advances religion in other ways. First, court preferences for religion punish people for not believing in God or going to church by making it less likely that such parents will gain custody of their children. Second, preferring religion could increase the number of children raised in religious households. This certainly would have the effect of advancing religion. Courts favoring religious parents in their custody decisions thus fail the second part of the *Lemon* test. They make the

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63. *cf.* Engel v. Vitale, 370 U.S. 421, 429 (1962) ("The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say ... "). The state cannot successfully defend this coercion by pointing out that the parent is not compelled to try to gain custody. The Supreme Court has already rejected a similar argument in a religious discrimination case. See *Torcaso v. Watkins*, 367 U.S. 488, 495-96 (1961) ("The fact ... that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution.").

64. *cf.* *Quiner v. Quiner*, 59 Cal. Rptr. 503, 517 (Ct. App. 1967) ("Deprivation of the custody of a child is not a 'slender' ... punishment: it is a heavy penalty to pay for the exercise of a religious belief . . . .").

65. Some commentators have observed that religious matching in adoption cases has the effect of advancing religion. *See Note, Religious Matching Statutes, supra note 36, at 271* ("By imputing a religion to a child who might otherwise be brought up without religion . . . religious matching laws effectively gain recruits for various religious denominations."); *see also Comment, supra note 30, at 813.

Research suggests that once children are placed in a religious home, they are more likely to become religious themselves. Parental religiosity and support for religion are good predictors of the religiosity of the child. *See Nelsen, Religious Transmission Versus Religious Formation: Preadolescent-Parent Interaction*, 21 Soc. Q. 207 (1980); *Hunsberger, supra note 38, at 168.

government a "sponsor" of religion, which is one of the three main evils the establishment clause was designed to prevent.66

C. Preferring the Religious Parent Impermissibly Entangles the State in Religious Affairs

The entanglement aspect of the Lemon test is designed to prevent excessive governmental involvement with religion.67 It keeps the "state from interfering in the essential autonomy of religious life, either by taking upon itself the decision of religious issues or by unduly involving itself in the supervision of religious institutions or officials."68 To keep the state out of religious affairs, the test forbids the state from supervising and surveying religion on a continuing basis.69 The entanglement test is particularly concerned with eliminating long-term relationships between the state and religion.70

Courts consider custody judgments to be temporary and subject to change when conditions and circumstances warrant it.71 Fre-
sequently the trial court retains jurisdiction over custody after making a judgment and orders modifications that it deems necessary. The general standard required for modification is proof of substantially changed circumstances affecting the child's best interest. The non-custodial parent is free to initiate reevaluation of the decision and attempt to prove changed circumstances. As a result, the "parent who has custody must lead his or her life under the watchful eye of the court, constantly fearing judicial intervention."

Courts have considered religion in a number of custody modification cases. For example, one court's list of "serious changes" justifying a change of custody included the fact that the children had not been taken to church and were being deprived of religious training.


74. Comment, supra note 45, at 750 n.107. The Comment argues that this "temporary nature of custody orders . . . encourages abuse of judicial discretion by making the orders subject to constant review and keeping parents . . . under indefinite judicial scrutiny." Id. at 750. It suggests that custody orders should be made permanent to protect the custodial parent from this indefinite scrutiny. Id. at 753.

A parent generally need not become unfit to lose custody of the child. See, e.g., Salvaggio v. Barnett, 248 S.W.2d 244, 246 (Tex. Civ. App. 1952). Usually all the court need do is decide that substantially changed circumstances indicate that a switch in custody is necessary to serve the child's best interest. See Frank v. Frank, 26 Ill. App. 3d 16, 19, 167 N.E.2d 577, 579 (1960); note 73 supra and accompanying text. While the noncustodial parent is usually the one requesting a change in custody, in at least one state the court may alter the custody decree on its own motion. See Goodman v. Goodman, 180 Neb. 83, 141 N.W.2d 445 (1966).

Courts that consider religion in change of custody cases are in essence supervising religion. They are allowing the religious practices of both parents and children to be a continuing subject of judicial inquiry and ground for court intervention should the judge disapprove of the current situation. This is an enduring and supervisory relationship between courts and religion amounting to an excessive entanglement.  

A different type of entanglement prohibited by the establishment clause is state involvement in purely religious disputes. The First Amendment requires the state to stay out of controversies over religious observance or failure to provide the child with religious training in ordering a change in custody. See, e.g., Allison v. Ovens, 4 Ariz. App. 496, 421 P.2d 929, 935 (1966), vacated in part on other grounds, 102 Ariz. 520, 433 P.2d 968 (1967), cert. denied, 390 U.S. 988 (1968); Murphy v. Murphy, 143 Conn. 600, 603, 124 A.2d 891, 893 (1956); Staggs v. Staggs, 250 Iowa 938, 945-46, 96 N.W.2d 736, 741-42 (1959) (ordering change of custody to the father, despite the fact that the mother had regularly taken the children to Sunday school; speculating that the mother's new baby would make future Sunday school attendance difficult, and noting that the religious atmosphere of the father's home was "of a very high standard"); Camelo v. Camelo, 402 So. 2d 174, 175 (La. Ct. App. 1981); Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 92-93, 447 N.Y.S.2d 893, 895, 432 N.E.2d 755, 767 (1982); Dean v. Dean, 32 N.C. App. 482, 232 S.E.2d 470, 471-72 (1977); Schreifels v. Schreifels, 47 Wash. 2d 409, 415-16, 287 P.2d 1001, 1005 (1955); see also Anhalt v. Fesler, 6 Kan. App. 2d 921, 923, 636 P.2d 224, 226 (1981) (religion and church attendance may be considered although they are not alone sufficient to warrant a change in custody); cf. Wood v. Wood, 461 S.W.2d 286, 289 (Mo. Ct. App. 1970) (considering religiousness in ordering a change in custody).  

Some courts refuse to consider religion in change of custody case, holding that the custodial parent has the right to control the child's religious education once custody has been awarded. See, e.g., In re Marriage of Russo, 21 Cal. App. 3d 72, 89, 98 Cal. Rptr. 501, 513 (1971); Boerger v. Boerger, 26 N.J. Super. 90, 96, 97 A.2d 419, 422 (Ch. Div. 1953); People ex rel. Portnoy v. Strasser, 303 N.Y. 559, 544, 104 N.E.2d 695, 699 (1952); Pfeffer, supra note 13, at 356-58 (arguing that both the Constitution and judicial policy demand that the custodial parent be allowed to decide on the religious upbringing of the child).  

76. See Broeder & Barrett, supra note 36, at 668-69 (quoting Rabbi Duker):  

Should adoptive parents be forced to submit to a continuous process of religious testing to see whether the home is sufficiently religious? . . . How do we assess the religious content of a home? . . .  

Carried to their logical conclusion, religious tests would involve continuous inspection of households by religious functionaries . . . . Shall clergymen of the various faiths become officially part of the state adoption apparatus?  

See also Pfeffer, supra note 13, at 359 ("When the purpose of state intervention and supervision is to control religious upbringing . . . it violates . . . the independence of church and state.").  

The dangers of this supervision and surveillance of religion would be particularly acute if the court were to attempt to make a factual showing that a particular religion or congregation taught certain moral values. See notes 48-49 supra and accompanying text. In such a case, the court would have no choice but to survey the religious organization to which the parent belonged. This prospect conjures up images of judges sitting in the back of churches, observing the service. This is exactly what the Supreme Court has made clear it most wants to avoid. See notes 67-70 supra and accompanying text. The potentially long-term nature of child custody disputes makes it unlikely that this would be a one-time event, thus increasing the degree of entanglement. See note 70 supra and accompanying text.
igious doctrine and polity\textsuperscript{77} to ensure governmental neutrality in these matters.\textsuperscript{78} This principle that the judiciary should not interfere in essentially religious disputes has led numerous state courts to refuse to enforce agreements between divorced or separated parents on the religious upbringing of the children.\textsuperscript{79} It also has led many judges deciding custody cases to refuse to evaluate the relative merits of different religious beliefs.\textsuperscript{80} These judges realize that deciding which parent’s religion is better for the child unduly entangles them in a religious dispute. There is no constitutional difference between deciding that one faith is better than another and deciding that faith is better than no faith.\textsuperscript{81} In both cases, the judge is evaluating the relative merits of the parents’ sentiments on religious matters. This

\textsuperscript{77} See note 49 \textit{supra} and accompanying text.


\textsuperscript{79} School Dist. of Abington Township v. Schempp, 374 U.S. 203, 243 n.9 (1963) (Brennan, J., concurring). Two central concerns, both implicating the entanglement aspect of the \textit{Lemon} test, have led many courts to refuse to enforce these agreements. One problem is that enforcement entangles civil courts in disputes over the merits of various religions. \textit{See} Hackett v. Hackett, 150 N.E.2d 431, 436, 438 (Ohio Ct. App. 1958) ("American governmental aloofness from ecclesiastical disputes would seem to foreclose judicial consideration of this argument . . . ") (citation omitted); \textit{see also} McLaughlin v. McLaughlin, 20 Conn. Supp. 274, 132 A.2d 420 (Conn. Super. Ct. 1959) (refusing to change custody because of violations of an antenuptial agreement about religious training for the children or to order its specific performance); Stanton v. Stanton, 213 Ga. 545, 100 S.E.2d 289, 293 (1957) (disregarding the parents’ contract relating to the religious training of their children); Lynch v. Uhlenhopp, 248 Iowa 68, 78 N.W.2d 491 (1956) (refusing to hold a mother in contempt for violating a custody decree that she would raise the child as a Roman Catholic and stating that enforcement of the contract would be unconstitutional, as it would amount to the court coercing a person to adhere to a religious faith); Brewer v. Cary, 148 Mo. App. 193, 127 S.W. 685, 692 (1910) (refusing specific enforcement of a prenuptial agreement on religious training).

The other difficulty with court enforcement of such decrees or agreements is that it entangles the court with religion by requiring it to supervise the child’s religious training continuously. Courts should not attempt to control the child’s religious upbringing after a custody order, for state intervention and supervision to control religious upbringing violates the independence of church and state. \textit{See} Pfeffer, \textit{supra} note 13, at 358-59. In \textit{Hackett} v. \textit{Hackett}, the court noted that observance of religious doctrine is a matter of “personal choice uncontrolled by law . . . . Nor can the free choice of religious practices be circumscribed or controlled by contract.” 150 N.E.2d at 433. The court also stated that policing the agreement to raise the child as a Catholic would raise problems of separating church and state. “This agreement differed from one concerning matters of a secular nature only . . . . Here we are dealing with matters of a religious nature only, which . . . are beyond the jurisdiction of the court to enforce by contempt proceedings or otherwise.” 150 N.E.2d at 440.


\textsuperscript{81} See note 22 \textit{supra} and accompanying text. Some courts realize that preferences for religion in general are just as impermissible as denominational preferences. \textit{See}, e.g., Welker v. Welker, 24 Wis. 2d 570, 129 N.W.2d 134, 138 (1964) (refusing to evaluate the comparative merits of religious attitudes in a custody contest between a religious parent and an agnostic); \textit{see also} Bonjour v. Bonjour, 592 P.2d 1233, 1243 (Alaska 1979); Quiner v. Quiner, 59 Cal. Rptr. 503, 517 (Cal. Ct. App. 1967); Blonsky v. Blonsky, 84 Ill. App. 3d 810, 816, 405 N.E.2d 1112, 1116-17 (1980) (quoting the trial judge: “I clearly don’t have an ability to determine which faith is better or if any faith is better.”).
type of decision takes judges "too far down the path of religious philosophy . . . thereby entangling them in debates particularly inappropriate to the judicial function." 82

Courts thus encounter serious constitutional problems by considering religion in custody cases when there is no showing that the child has personal religious convictions. The preference for religious over nonreligious parents violates all three elements of the Lemon test: it serves a religious rather than a secular purpose, it has the primary effect of advancing religion and it impermissibly entangles the state with religion. Given that religion may not constitutionally be a factor in these cases, judges should not even inquire into religious practices or beliefs. 83 Such questioning raises the danger that the trial judge will be unconsciously affected by religion in reaching her decision without this being apparent to the appellate court. 84 The impermissibility of judges inquiring into religion and considering it in their custody decisions changes, however, when a minor has personal convictions about religion.

II. CONSIDERING RELIGION WHEN A MINOR HAS SINCERE RELIGIOUS CONVICTIONS

Many state statutes include a mature child's wishes as a factor in the determination of the child's best interest in custody disputes. 85

83. See generally Comment, supra note 45, at 753 (suggesting that no evidence that relates to a parent's "exercise of a constitutional right" should be admitted "absent a clear showing that such evidence has a direct bearing upon the welfare of the child"). When the child fails to express a custody preference based on religion, there is no such "clear showing" to allow the admission of evidence on religion. Cf. note 104 infra.
84. A number of factors indicate the importance of not asking questions about religion when there is no showing that religion is relevant. These factors include the difficulty the judge may face in remaining religiously neutral, see note 45 supra, the broad discretion afforded the trial judge and the loose standard of appellate review. The broad discretion of the trial judge may mean that constitutional violations do not appear in the record. See Zazoway, Religious Upbringing of Children after Divorce, 56 NOTRE DAME LAW. 160, 165 (1980) ("Since the trial judge's decision will be reversed only upon a clear showing of abuse, a judge might draft his custody order to promote one belief over another and hide his motivation within the wide discretion afforded him by the imprecision of the 'best interest' standard."). Pfeffer has made a similar observation:

A judge passing upon custody applicants has so large a degree of discretion, and the factors that may properly be considered are so numerous and variegated that he can generally give effect to his own religious predispositions without even mentioning religion, and can do so without much risk of appellate reversal. Pfeffer, supra note 13, at 366. Even if the constitutional violation appears on the record, the broad discretion afforded the trial judge makes it unlikely that a reviewing court will closely scrutinize the record for constitutional or statutory violations. See J. McCABEY, M. KAUFMAN & C. KRAUT, CHILD CUSTODY AND VISITATION LAW PRACTICE § 26.06 (1983) (Since the decision is largely within the trial judge's discretion, "the appellate court places strong reliance upon the trial judge's determination of what course of action will be in the best interests of the children.").
Other statutes allow children age fourteen or older to choose their custodian unless the court determines that this would be contrary to their best interest. With or without specific statutory authorization, courts frequently abide by the custody preferences of minors who are of “sufficient mental maturity intelligently and rationally to formulate them.”

While courts will carefully consider children’s preferences, they are not binding on the court in the absence of any contrary statutory provision. The judge is generally free to find that the child’s expressed wish is not in his best interest. Courts usually evaluate the child’s expressed preference in light of factors such as the child’s age, intelligence, maturity and freedom to make his own decision. The trial judge determines the weight to be given to the child’s preference from this evaluation. Although judges tend to give more weight to the custody preferences of older children, they will consider the preferences of younger children found to be mature and intelligent.

When a mature minor expresses a preference to live with one parent over the other because of the child’s desire to practice or not to practice a religion, the court may consider religion in determin-

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87. Scanlon v. Scanlon, 29 N.J. Super. 317, 326, 102 A.2d 656, 662 (1954); see also note 103 infra and accompanying text.
88. See, e.g., McCullogh v. McCullogh, 222 Ark. 390, 260 S.W.2d 463 (1953) (not heeding preference of 15-year-old); Commonwealth ex rel. Shameneck v. Allen, 179 Pa. Super. 169, 116 A.2d 336, 339 (1955) (children’s expressed wishes are not controlling though they should be carefully considered); Weinman, The Trial Judge Awards Custody, 10 LAW & CONTEMP. PROBS. 721, 729 (1944) (“Welfare controls choice and the court will not permit the choice of the child to lead to an improper custody.”).
89. See, e.g., Fohr v. Fohr, 75 Ill. App. 3d 575, 579, 394 N.E.2d 87, 90 (1979) (“Before a judge can properly weigh an election he must satisfy himself that the child is making it while possessed of the understanding that his age, intelligence, knowledge and experience will permit him to assimilate.”); Pozzo v. Pozzo, 113 N.H. 436, 437, 309 A.2d 151, 153 (1973) (The desires of the child “should be given more or less weight depending upon the age of the child and his ability to form an intelligent judgment.”); Commonwealth ex rel. Stevens v. Shannon, 107 Pa. Super. 557, 164 A. 352, 354 (1933) (“Even the preference expressed by a child must be based on good reasons, and the child’s maturity and intelligence must be considered.”).
90. Brosky & Alford, Sharpening Solomon’s Sword: Current Considerations in Child Custody Cases, 81 DICK. L. REV. 683, 689 (1977). The deciding factor is still the child’s best interest. See Knoblauch v. Jones, 613 S.W.2d 161, 167 (Mo. Ct. App. 1981) (The court must evaluate the basis for the child’s wishes so it can “properly place this element in its proper perspective in deciding what is in the best interest of the child.”).
93. Since the establishment clause bars the government from preferring religion to nonreligion, see notes 21-22 supra and accompanying text, a child’s desire to avoid religion should be
The court's use of religion, however, should be limited in a number of respects. First, the court should only consider religion when the child has actually expressed a religion-based custody preference. It is essential that the court not impute this preference to the child by deciding that the child "needs religion." The court must also treat custody preferences based on religion in the same way it treats those based on irreligion.

Once the child has expressed a religion-based custody preference, the court should not defer to it any more than it would to a preference based on other relevant factors. This means that the court is generally free to find that the preference is not in the child's best interest. It also means that the court should weigh the religion-regarded as a "religious decision" and should be treated like a child's preference for religion in general or for a specific religion.

94. The establishment clause analysis in Part II is based on constitutional permissiveness — i.e., it concludes that a court may rely on the religious needs of a mature child when the child has expressed a religion-based custody preference. To the extent that minors have a right to the free exercise of their religion, this too would be implicated in such situations. An analysis under the free exercise clause would discuss a constitutional mandate — i.e., whether a court must facilitate a mature child's practice of her religion. See Mangrum, supra note 6, at 58-59. For a discussion of children's free exercise rights or the lack thereof, see id; Pfeffer, supra note 13, at 354-56; Note, The Religious Upbringing of Children After Divorce, 56 Notre Dame L. Rev. 1135 (1980) [hereinafter cited as Note, Religious Upbringing]; Note, Adjudicating what Yoder Left Unresolved: Religious Rights for Minor Children after Danforth and Carey, 126 U. Pa. L. Rev. 1135 (1978) [hereinafter cited as Note, What Yoder Left Unresolved].

95. A "presumption that a child 'needs religion' " that is not based on desires expressed by the child "converts [a] secular . . . purpose into a judicial preference for religion." Bonjour v. Bonjour, 592 P.2d 1233, 1240 (Alaska 1979). Instead of neutrally facilitating a child's preference, the court is advancing its own preference for religion. This moves the state away from neutrality into a position of sponsorship. See note 6 supra.

The constitutionality of state statutes instructing the court to consider the child's religious needs or continuation of the child's religious education in custody disputes, see note 4 supra, thus depends on how these statutes are interpreted and applied. None of these statutes say whether the court, the parent or the child is the one to decide whether there are religious needs in the first place. If they are used to impute religious needs to a child, they are unconstitutional. If they are interpreted to allow consideration of religion only when the child has expressed an actual preference, they are constitutional. See Bonjour v. Bonjour, 592 P.2d at 1233 (using this analysis to find the Alaska statute constitutional on its face).

96. A child's aversion to religious training must be considered. See Bonjour v. Bonjour, 592 P.2d 1233, 1240 (Alaska 1979) (Courts resolving custody disputes may consider "the expressed preference of a child mature enough to make a choice between a form of religion or the lack of it."); see also note 93 supra and accompanying text.

97. The court's task in custody cases is to determine the best interest of the child. See notes 1-5 supra and accompanying text. Courts should consider religion because, presumably, respecting the child's reasonable preferences serves the child's best interest. Whether or not the child's preference is based on religion, the inquiry remains the same — what is best for the child. If courts allow a religious preference to control their decision when they would not have allowed the child's preference based on other factors to do so, they are sponsoring religion rather than neutrally factoring the child's preference into the best interest equation. 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.

98. See Goodman v. Goodman, 180 Neb. 83, 141 N.W.2d 445 (1966) (awarding custody of 11- and 14-year-old children to their father despite their expressed preference for their mother and her religion, finding that this was in the children's best interest). List explains that "where
based choice according to the child's maturity, sincerity, capacity and freedom to choose and express that choice. As with custody preferences in general, courts tend to give more weight to the wishes of older children, but will consider the desires of younger children when the circumstances warrant it. In some cases the judge has refused to take a child's religious views into account, believing them

the child is old enough to have developed an interest in and a preference for a particular religion, the courts are reluctant to choose custodians of a different religion. These cases depend upon the age of the child. But no substantial sacrifice of a child's purely temporal interests will be made in order to insure that it receives training in any particular religion."

List, supra note 14, at 16. The judge may and should disregard a child's religion-based custody preference that threatens her temporal health or safety. See notes 14-17, supra and accompanying text.


In Yoder, the Supreme Court did not resolve the question of what rights Amish children wanting to attend school after age 14 would have against their parents. Justice Douglas, dissenting in part, argued that the Court should have answered this question. In his view, 14-year-old children have the capacity to make free exercise decisions. "There is substantial agreement among child psychologists and sociologists that the moral and intellectual maturity of the 14-year-old approaches that of the adult." 406 U.S. at 245 n.3; see also Note, What Yoder Left Unresolved, supra note 93, at 1155 n.101 ("There is now considerable evidence to the effect that adolescents possess the intellectual capacity necessary for the meaningful exercise of first amendment religious rights.").

For cases finding the child to be too young to form an opinion on religion, see Sullivan v. Sullivan, 141 Conn. 235, 104 A.2d 989 (Conn. 1954) (placing an 8-year-old in a religious school would not prevent her from making her own choice of religion when she reached the age of discretion); Wojnarowicz v. Wojnarowicz, 48 N.J. Super. 349, 137 A.2d 618 (1958) (7-, 5-, and 3-year-olds too immature to have opinions on religion); Perlstein v. Perlstein, 79 A.D. 2049, 429 N.Y.S.2d 896, 901 (1980) (giving "little or no weight" to the preference of a 6-year-old to live with his mother who was not raising him as an Orthodox Jew, contrary to a separation agreement); Schwarzman v. Schwarzman, 88 Misc. 2d 866, 871, 388 N.Y.S.2d 993, 997 (Sup. Ct. 1976) (10-year-old too young "to suffer the imposition of a choice of religion."); Munoz v. Munoz, 79 Wash. 2d 810, 814, 489 P.2d 1133, 1135 (1971) (according to trial court, 6-year-old too young to make religious decision, but would be able to make own determination at 12 or 13).

101. See Boerger v. Boerger, 26 N.J. Super. 90, 103, 97 A.2d 419, 426 (1953) (considering the preference of a 9-year-old, as she was "a bright girl, far above average in intelligence and insight"); In re McConnon, 60 Misc. 22, 23-24, 112 N.Y.S. 590, 591 (N.Y. Sup. Ct. 1908) (giving considerable weight to the testimony of a 10-year-old who was "of intelligence sufficient . . . to comprehend the nature of an oath" and who expressed "a desire to continue in the church of his father").
to be a product of one parent's coercion. In most cases, however, courts have found it appropriate to consider the religious desires of children who are able to form a reasoned judgment.

The religious practices of the parents can influence how much weight courts should give to a child's religion-based custody preference. Courts should be reluctant to place the child against her religion-based wishes when the potential custodian would actively interfere with the child's religion or irreligion. On the other hand,

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102. A number of courts have indicated their concern that a parent has coerced or unduly influenced the child expressing a religion-based custody preference. See Boerger v. Boerger, 26 N.J. Super. 90, 103, 97 A.2d 419, 426 (1953) (noting the dangers of coercion when interviewing a minor about his preferences, whether or not they are based on religion); Schwarzman v. Schwarzman, 88 Misc. 866, 874, 388 N.Y.S.2d 993, 999 (N.Y. Sup. Ct. 1976) (children "not capable, competent or free enough to make such a choice at this time") (emphasis added); Gluckstern v. Gluckstern, 31 Misc. 2d 58, 60, 220 N.Y.S.2d 623, 624 (N.Y. Sup. Ct. 1961) ("I am convinced that plaintiff has greatly influenced this infant's thinking and present desire to become a Christian Scientist ... "); cf. In re McConnon, 60 Misc. 22, 24, 112 N.Y.S. 590, 591 (N.Y. Sup. Ct. 1908) (judge emphasized that he had taken pains to examine the boy separately from any parties to the proceeding). Although finding it inapplicable to the case at hand, the court in In re Vardinakis, 160 Misc. 13, 17, 289 N.Y.S. 355, 361 (N.Y. Dom. Rel. Ct. 1936), stated the general proposition that a court could not consider "too seriously what may reasonably be considered either as an impulsive reaction of a child or the indoctrinated words of a child repeated without conviction at the instance of some zealous adult." See also Weinman, supra note 88, at 729 ("The court must be assured that neither parent is exerting any influence upon the judgment of the child. . . . The judge must be certain that the child . . . is free from all undue restraint.").


104. The court has no need to elicit any evidence on the parents' religious attitudes or activities until it determines that the child has a sincere religious preference. See notes 83-84 supra and accompanying text. Once the child has expressed such a preference, however, evidence of the parents' religious attitudes and activities may be an important part of the best interest equation. See note 85 supra and accompanying text. Thus, the judge may question both the child and the parents about religion. Although the judge's inquiry to the parents should focus on their attitudes toward the child's religious choice and not on their own religious choices, as a practical matter it is quite likely that probing into the former will produce evidence of the latter. For example, if a child who has chosen to pursue Judaism complains that her mother, a Catholic, is forcing her to accompany her to mass, the court will need to discover whether or not the mother actually does attend mass. Judges should always remember their purpose for eliciting this information, and should consider each parent's religion only to evaluate the child's choice. See also note 108 infra and accompanying text.

105. Parental interference can take a variety of forms. For example, a parent could be actively hostile and attempt to prevent the child from exercising her religion. In Ex Parte Agnello, 72 N.Y.S.2d 186 (Sup. Ct. 1947), the court refused a father's petition to change custody because the 13-year-old twins wanted to stay with their aunts. One of the twins was an altar boy and wanted to be a priest. The father was an atheist who was openly opposed to Catholicism. A similar problem arises for a child who wants to live in a kosher home and only one parent will keep kosher.

A parent may also attempt to force her own religion on the child. Fettig v. Fettig, 619 S.W.2d 262 (Tex. Civ. App. 1981), provides a good illustration of how this situation should be handled. Three minors aged 18, 15, and 14, wanted to live with their father primarily because their mother, a Jehovah's Witness, was forcing her religion on them. The court treated the minors' religion-based preferences just as it would have treated preferences based on any other relevant fact. The court interviewed the minors as required by statute and determined that their preferences were entitled to great weight. In awarding the children to their father, the judge did not unduly consider religion. He merely weighed the mother's disrespect for the
courts should more readily allow other factors to outweigh the child’s custody preference when both parents would respect the child’s religious choice. 106 This distinction between parents who will and will not impede a child’s religious desires is based on the secular goal of serving the child’s best interest, which includes the freedom to pursue her religious desires. 107 Courts should always remember that they are considering the parents’ religious views only because the child has expressed a religion-based custody preference and thus should examine the parents’ religious attitudes and practices only to the extent necessary to determine their effects on the child. 108

A number of factors thus limit the use of religion in custody cases even when the child has a religion-based preference. However, a practice that allows judges to consider a religious factor, even to a limited extent, should be analyzed under the Lemon test. 109 The test indicates that the establishment clause permits the use of religion, properly limited, in custody disputes.

children’s religious needs as a relevant factor in determining custody. See also Developments in the Law: the Constitution and the Family, 93 HARY. L. REV. 1156, 1339 (1980):

If a child has actual rather than presumed religious needs, parental unwillingness to respect the child’s preference and provide the requisite freedom for his or her pursuits may constitutionally be included as a factor in the choice of custodian. Of course, a child’s actual aversion to religious training or activities would also constitute a “religious need” that would permit a parent’s religious beliefs to be taken into account to the extent that the religious parent was unwilling to respect the child’s agnostic preferences.

106. As in the case of a child’s preference for one parent based on secular concerns, a preference based on religious concerns can be overridden by other factors weighing in favor of the parent the child did not choose. The fact that a parent shares a child’s religious beliefs makes it likely that the parent will respect the child’s beliefs. This does not mean, however, that a parent whose religious preferences differ from those of the child will disrespect the child’s beliefs. In determining the parents’ attitudes towards the child’s religion, the judge should focus on evaluating the sincerity of the parents’ respective claims that they will respect the child’s choice. The judge should not be deciding which parent’s religious preferences best coincide with those of the child.

The religion factor should play less of a role in the custody decision once the judge has determined that the parent with differing beliefs will honor the child’s religious choice. While it is still relevant that the child chose one parent for religious reasons, the court should be willing to override that choice when most factors indicate that the other parent would be the better custodian.

107. See notes 112-13 infra and accompanying text.

108. Religion only becomes a factor because the child has expressed a preference for one parent for religious reasons. Thus, the scope of the inquiry is defined by the purpose of accommodating the child’s choice. The court’s role is not to reward a parent’s religiousness or engage in a contest of comparative devoutness, but rather to determine the child’s best interest. The court should focus on the child’s ability to pick her custodian. See notes 87-89 supra and accompanying text. The court should also examine the parents’ comparative willingness to allow the child to practice her religion. See notes 104-08 supra and accompanying text. These factors tell the court how probative the child’s religious preference is in determining her secular best interest.

109. When courts follow a child’s custody choice that is based on a desire to practice her religion, they are arguably preferring something religious. State preferences for religion should be analyzed under the Lemon test. See note 25 supra and accompanying text.
A. Considering Religion When the Child Has Religious Convictions Has a Secular Purpose

Determining the child’s best interest is the secular purpose of child custody decisions. Courts generally try to accommodate the reasonable custody preference of a child, as they think this enhances the child’s secular welfare. Considering a child’s legitimate religion-based preference, like considering preferences based on other factors, serves a secular purpose by promoting the child’s best interest. It does so by helping to ensure that the person awarded custody will allow the child to pursue her legitimate desires.

Considering religion in this context not only serves a secular purpose, but it also avoids other potential constitutional problems. Courts eliminating religion from the best interest equation when the child has a religion-based preference act with hostility rather than neutrality towards religion.

110. The terms “reasonable” and “legitimate” are used in this discussion of the child’s religious choice to exclude cases where the choice threatens the child’s well-being. When such a threat exists, the judge must determine whether the best interest standard requires him to ignore the child’s preference. See notes 14-19, 98 supra and accompanying text.

111. See notes 85-87 supra and accompanying text.

112. See Bonjour v. Bonjour, 592 P.2d 1233, 1240 (Alaska 1979) (“The primary goal of the court in awarding custody is to further the best interests of the child, which includes respecting the beliefs of a mature child, whether they be religious or non-religious.”); CLARK, THE LAW OF DOMESTIC RELATIONS 589 (1968); Pfeffer, supra note 13, at 355-56 (A child's religious preferences are “relevant evidence” in “ascertaining the course of action most likely to promote the child's temporal welfare and happiness.”).

113. Authorities have recognized other secular reasons for awarding custody to the chosen parent. See, e.g., In re Vardiakis, 160 Misc. 13, 289 N.Y.S. 355, 361 (N.Y. Dom. Rel. Ct. 1936) (“In choosing the religion of one parent rather than the other, the child is frequently either consciously or unconsciously also choosing one parent rather than the other and is indicating to the court in the clearest way possible with which parent he has most sympathy and the greatest sense of security.” Thus, the choice of religion by an intelligent, mature child must be “seriously considered in determining what is best for his own welfare.”).

Courts respecting a child’s religious preference may believe that a change in religious environment will be traumatic for the child, or that implicit in the child’s religious desires is a preference for one home rather than another. To couch such secular considerations in religious terms only confuses the real issue — determining the placement that will best promote the child’s secular welfare.

Comment, supra note 30, at 817.

114. See Bonjour v. Bonjour, 592 P.2d 1233, 1243 (Alaska 1979); cf. Widmar v. Vincent, 454 U.S. 263 (1983). In Widmar the Court struck down a University of Missouri regulation that barred student groups from using generally available facilities for religious worship and teaching on free speech grounds, and stated that an equal access policy would not violate the establishment clause and that under the circumstances in that case “by creating a forum the University does not thereby endorse or promote any of the particular ideas aired there.” 454 U.S. at 271-72 n.10. The Court noted that the “provision of benefits to so broad a spectrum of groups is an important index of secular effect.” 454 U.S. at 274: Under these circumstances, an equal access policy would be one of “neutrality toward religion,” not sponsorship. 454 U.S. at 274 n.14 (emphasis added). The Court distinguished Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203 (1948), where only religious groups had been given access to the school’s facilities, since in that situation “the school may appear to sponsor the views of the speaker.” 454 U.S. at 271-72 n.10.
forbids.\textsuperscript{115}

A different situation is presented by the court that decides that a child needs religion when that child has expressed no religious desires. Here the judge is assuming that religion is an important element in the child's life, rather than evaluating the child's announcement that religion is important to her. The judge is impermissibly favoring religion, instead of permissibly trying to accommodate the child's own choice.\textsuperscript{116}

The existence of a secular purpose, however, does not alone satisfy the \textit{Lemon} test. Allowing religion to be a factor in custody decisions violates the establishment clause if its principal or primary effect is to advance religion. When the child has a religion-based preference, this is not the case.

\textbf{B. Considering Religion Does Not Have the Principal or Primary Effect of Advancing Religion}

Laws that indirectly or incidentally benefit religion do not violate the establishment clause.\textsuperscript{117} While a law with a primarily secular effect may be examined to see if it has the "direct and immediate effect of advancing religion," a "remote and incidental" effect is not enough to violate the establishment clause.\textsuperscript{118} The issue is one of degree.\textsuperscript{119}

Considering religion in custody cases when the child has a religion-based preference produces a primarily secular effect — the enhancement of the child's best interest.\textsuperscript{120} One must ask, however, if

\begin{itemize}
  \item \textsuperscript{115} See \textit{Lynch v. Donnelly}, 104 S. Ct. 1355, 1359 (1984) ("[T]he Constitution . . . affirmatively mandates accommodation, not merely tolerance of all religions, and forbids hostility toward any."); \textit{Everson v. Board of Educ.}, 330 U.S. 1, 18 (1946) (The first amendment "requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."); see also \textit{Epperson v. Arkansas}, 393 U.S. 97, 103-04 (1968); \textit{Illinois ex rel. McCollum v. Board of Educ.}, 333 U.S. 203, 211-12 (1948).
  \item \textsuperscript{116} \textit{Bonjour v. Bonjour}, 592 P.2d 1233, 1242 (Alaska 1979). When a judge considers religion because of a child's preference, she is not considering religion unnecessarily. This satisfies the requirement that the state not use religious means to achieve secular ends when purely secular means are available. See note 51 \textit{supra} and accompanying text. There simply is no purely secular way to consider a religious preference.
  \item \textsuperscript{117} See \textit{Roemer v. Board of Pub. Works}, 426 U.S. 736, 747 (1976) ("\textit{Everson and Allen} put to rest any argument that the State may never act in such a way that has the incidental effect of facilitating religious activity."). The Court frequently has upheld benefits to religious activity that it considered to be incidental or indirect. See, e.g., \textit{Board of Educ. v. Allen}, 392 U.S. 236 (1968) (secular textbooks for religious schools); \textit{McGowan v. Maryland}, 366 U.S. 420 (1961) (Sunday closing laws); \textit{Everson v. Board of Educ.}, 330 U.S. 1 (1947) (bus transportation to religious schools).
  \item \textsuperscript{118} Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 783-84 n.39 (1973). "[N]ot every law that confers an 'indirect,' remote, 'or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid." 413 U.S. at 771.
  \item \textsuperscript{119} \textit{Zorach v. Clauson}, 343 U.S. 306, 314 (1952).
  \item \textsuperscript{120} See notes 110-13 \textit{supra} and accompanying text.
\end{itemize}
promoting the child’s secular best interest also directly or immediately advances religion. An analysis of this question suggests that it does not.

One important factor in determining whether a practice has a primary, as opposed to an incidental, religious effect is whether it “conferring[s] any imprimatur of state approval on religious sects or practices.”121 When a court considers religion strictly within the context of the child’s preference, it displays neutrality towards rather than approval of religion. In such cases, the judge is trying to enhance the temporal welfare of a child who has announced that religion or nonreligion is important to her. The judge “is exercising no value judgment nor manifesting any unneutrality between conventional religion and irreligiosity or unconventional religion.”122 The court is thus taking care not to “substitute its own preferences, either for or against a particular type of religious observance,” but is instead “retain[ing] a strict neutrality.”123 As the state is behaving neutrally, and not as a “sponsor,” any benefit that its conduct confers on religion is largely incidental.124

Judges who impute religion to a child or decide that religiousness is an attribute of a good home confer state approval on religion.125 This approval has the effect of advancing religion, as it coerces people into being religious or at least professing to be so.126 When the focus is on the child, however, the judge is simply accommodating that child’s reasonable preference.127 Laws having reasons or effects that coincide or harmonize incidentally with religious tenets do not

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121. See Widmar v. Vincent, 454 U.S. 263 (1981), discussed at note 114 supra. The Court in Widmar found that “any religious benefits of an open forum at [the university] would be incidental.” The Court emphasized the fact that “an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices.” 454 U.S. at 274. Justice Stevens, concurring, noted that the record disclosed “no danger that the University will appear to sponsor any particular religion.” 454 U.S. at 280-81. The Court doubted that “students could draw any reasonable inference of University support from the mere fact of a campus meeting place.” 454 U.S. at 274 n.14.

122. Pfeffer, supra note 13, at 372. This observation was made in the analogous context of adoption.


124. See note 121 supra and accompanying text.

125. See note 59 supra and accompanying text.

126. See notes 60-62 supra and accompanying text.

127. Arguably, an element of coercion remains. A parent may be influenced by the knowledge that the judge will consider the child's religion-based preference. Yet the state is not coercing the parent to change or claim to have changed her religious practices, as it was in Part I. Here the state is inquiring only into the parents' willingness to allow the child the freedom to pursue her religious desires. It is also significant that the coercion is not the result of the state's conferring its approval on certain religious beliefs. See notes 121-24 supra and accompanying text. Additionally, any coercion operating on the parent will not result in pressure on the child to adopt certain religious practices, which is another constitutional peril. See note 65 supra and accompanying text. In fact, the opposite result is likely. If the coercion on the parent affects the child at all, it would promote her religious freedom.
violate the establishment clause.\textsuperscript{128} Factoring religion into the best interest equation for children with sincere religious convictions thus has a secular purpose and a predominantly secular effect. The final and perhaps most difficult barrier remains to be surmounted.

C. Considering Religion Does Not Foster an Excessive Governmental Entanglement with Religion

Some involvement and entanglement between government and religion are inevitable.\textsuperscript{129} A practice is not necessarily invalid because it engenders a continuing relationship between the state and religion,\textsuperscript{130} or because the judge exercises some degree of supervision over religion. "The test is inescapably one of degree,"\textsuperscript{131} as it prohibits only \textit{excessive} governmental entanglement with religion.\textsuperscript{132}

Allowing judges to consider religion-based custody preferences clearly results in some entanglement between state and religion. It permits a judge to question the child and her parents about the child's religious preference and to factor their responses into the best interest equation.\textsuperscript{133} Moreover, the involvement between state and religion could be long-term, as judges may consider the child's reli-

\textsuperscript{128} Harris v. McRae, 448 U.S. 297, 319 (1980); McGowan v. Maryland, 366 U.S. 420, 442 (1961); Bonjour v. Bonjour, 592 P.2d 1233, 1243 (Alaska 1979). Additionally, programs designed to accommodate a person's right to the free exercise of religion are not generally forbidden by the establishment clause. Bonjour v. Bonjour, 592 P.2d 1233, 1243 (Alaska 1979) (citing Zorach v. Clauson, 343 U.S. 306 (1952), which upheld programs releasing children from school to go elsewhere for religious instruction). To the extent that children have an argument based on their free exercise rights, this doctrine would also come into play. \textit{See note 94 supra.}

\textsuperscript{129} See Lemon v. Kurtzman, 403 U.S. 602, 614 (1971), where the Court explained that the objective behind the entanglement test is to prevent \textit{as much as possible} the intrusion of the state and religion into each other's precincts. "Some involvement and entanglement are inevitable," but "lines must be drawn." 403 U.S. at 625; \textit{see also} Lynch v. Donnelly, 104 S. Ct. 1355, 1358 (1984) (total separation of church and state is "not possible").

\textsuperscript{130} \textit{See, e.g.}, Roemer v. Board of Pub. Works, 426 U.S. 736 (1976). The Court upheld a statute giving annual subsidies, solely for secular purposes, to private institutions of higher learning that did not award solely seminarian or theological degrees. The Maryland Council for Higher Education had the continuing responsibility for enforcing both eligibility provisions. The Court commented that "though indisputably relevant . . . the annual nature of the aid cannot be dispositive." 426 U.S. at 766. In Tilton v. Richardson, 403 U.S. 672, (1971), the Court suggested that de minimus contact does not violate the establishment clause. The Court upheld government aid to colleges in the form of a one-time construction grant. The government, however, retained the right to inspect the subsidized buildings to insure they were not being used for sectarian purposes. "Inspection as to use is a minimal contact." 403 U.S. at 688; \textit{see also} Hunt v. McNair, 413 U.S. 734 (1973).


\textsuperscript{132} \textit{See Walz v. Tax Commn.}, 397 U.S. 664, 675 (1970); \textit{see also} Roemer v. Board of Pub. Works, 426 U.S. 736, 766 (1976) ("There is no exact science in gauging the entanglement of church and state. The wording of the test, which speaks of 'excessive entanglement,' itself makes that clear. The relevant factors . . . are to be considered 'cumulatively' in judging the degree of entanglement.").

\textsuperscript{133} \textit{See note 104 supra.}
gious preference in later change of custody proceedings.\footnote{134} A number of factors suggest, however, that this degree of entanglement is not excessive. First, it is important to identify the nature of the court's involvement with the child's religion-based custody preference. When the child expresses this choice, the main function of the judge is to evaluate the child's ability to make decisions in her own best interest.\footnote{135} This inquiry tells the judge whether or not the religion-based preference deserves great weight because, for example, it is sincere and well-reasoned. Judges permissibly promote the secular best interest of a child by respecting her reasonable preferences.\footnote{136}

In deciding how to weigh a child's preference, a judge may consider each parent's willingness to respect the child's religious choice.\footnote{137} This inquiry focuses on religion not to evaluate whether the parents' religious beliefs or practices are bad or good but rather to determine whether they are compatible with the child's wishes. Thus, the court does not address questions of the relative merits of religious doctrines that it is not permitted to answer.\footnote{138}

Apart from cases of religions with dangerous practices,\footnote{139} the court will not need to debate the wisdom of the child's religious preference. The court is not deciding that one religion is better for the child than another, or that religion is better than irreligion. The child has already made that decision for herself. The State's role is limited to determining the ability of the child to make a reasonable evaluation.

Judicial consideration of a child's religion-based custody preference is essentially secular. It focuses on the child's capacity to choose and the parents' probable responses to that choice. It does not force the court to answer questions of religious doctrine. Thus, the practice does not excessively entangle the state with religion.\footnote{140}

The Lemon test indicates that the establishment clause permits courts to consider a child's personal and mature religious preference in custody cases. The practice has a secular purpose and a primary

\footnotetext{134}{See, e.g., Goodman v. Goodman, 180 Neb. 83, 141 N.W.2d 445 (Neb. 1966); Ex parte Agnello, 72 N.Y.S.2d 186 (N.Y. Sup. Ct. 1947); In re Vardiakis, 160 Misc. 13, 289 N.Y.S. 355, 361 (N.Y. Dom. Rel. Ct. 1936). The fact that a relationship between church and state is long-term indicates that it may amount to an excessive entanglement. See note 70 supra and accompanying text. This factor alone, however, is not dispositive. See note 130 supra and accompanying text.}

\footnotetext{135}{See notes 87-92, 99-103 supra and accompanying text; see also Bonjour v. Bonjour, 592 P.2d 1233, 1240 n.14 (Alaska 1979).}

\footnotetext{136}{See notes 111-13 supra and accompanying text.}

\footnotetext{137}{See notes 104-06 supra and accompanying text.}

\footnotetext{138}{See note 49, 77-82 supra and accompanying text.}

\footnotetext{139}{See note 98 supra.}

\footnotetext{140}{See Bonjour v. Bonjour, 592 P.2d 1233, 1243-44 n.23 (Alaska 1979).}
effect that neither advances nor inhibits religion. Although it necessitates some state involvement with religion, it does not foster an excessive governmental entanglement.

CONCLUSION

The establishment clause generally prohibits judges from inquiring into religion during custody hearings, and from including religion in their determination of the child's best interest. Judges favoring religious parents when the child has no religious preference put the vast coercive power of the state behind religion. They step outside of their role as secular officials by trying to promote spiritual rather than temporal well-being. The establishment clause exists to prevent such practices.

The situation differs when the child expresses a religion-based preference for one parent. The judge now may neutrally facilitate the child's preference for religion without unduly involving the state. Religion becomes an issue only because the child announces that it is important to her. The court's inquiry into religion also is limited to evaluating the child's religious choice and the willingness of each parent to respect that decision. Finally, the establishment clause permits this limited use of religion because it serves the child's secular best interest.