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Considering Religion as a Factor in Foster Care in the Aftermath of Employment Division, Department of Human Resources v. Smith and the Religious Freedom Restoration Act

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CONSIDERING RELIGION AS A FACTOR IN FOSTER CARE IN THE AFTERMATH OF *EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES V. SMITH* AND THE RELIGIOUS FREEDOM RESTORATION ACT

Thomas J. Cunningham[*]

I. INTRODUCTION

Most rights considered by Americans to be "fundamental" are granted a special level of protection by the decisions of the United States Supreme Court.[1] The standard is often described as "strict scrutiny" or "compelling interest."[2] Under this standard of protection, a state must have more than just a good

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1. For example, free speech (Whitney v. California, 274 U.S. 357, 373 (1926) (Brandeis, J., concurring)); unreasonable searches and seizures (Mapp v. Ohio, 367 U.S. 643 (1961)); and the right to a jury trial (Duncan v. Louisiana, 391 U.S. 145 (1968)) are all considered "fundamental" rights. *See also* THE BILL OF RIGHTS IN THE MODERN STATE (Geoffrey R. Stone et al. eds., 1992).

2. "The compelling interest test is . . . the most exacting level of constitutional scrutiny." Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 127 (1992) [hereinafter McConnell, *Crossroads*]. *See* Palmore v. Sidoti, 466 U.S. 429, 432 (1984) ("[racial] classifications are subject to the most exacting scrutiny"); Fullilove v. Klutznick, 448 U.S. 448, 480 (1980) ("Congress may employ racial or ethnic classifications . . . only if [they] do not violate the equal protection component"); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) ("any classification which serves to penalize the exercise of [a constitutional] right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional") (emphasis added). *See also* John H. Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 7-9 (1978) (comparing the use of strict scrutiny by the Warren and Burger Courts).

reason for writing legislation that encroaches upon its citizens' fundamental rights.[3] Rather, the state must be able to prove a "compelling" interest in achieving some desired result, a result which necessitates the curtailment of fundamental rights.[4] In 1990, however, the United States Supreme Court substantially restricted a right from this list: the right to freely exercise one's religion.[5] The Court's decision, however, was subsequently severely criticized.[6] In response to the criticism, Congress

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3. The "mere rationality" level of scrutiny inquires whether the statute, regulation, or practice is rationally related to a legitimate state purpose. *See In re* San Juan DuPont Plaza Hotel Fire Litigation, 687 F. Supp. 716, 734 (D.P.R. 1988) ("In . . . respect [to the property right to sue], the Due Process Clause generally protects citizens from arbitrary and capricious actions by the state.").

4. *See* Russell W. Galloway, *Basic Free Exercise Clause Analysis*, 29 SANTA CLARA L. REV. 865, 871-76 (1989) (outlining the goals and justifications required for legislative action) [hereinafter Galloway, *Basic Free Exercise*].

5. *See* Employment Div., Dep't. of Human Resources v. Smith, 494 U.S. 872 (1990), *rev'g* 763 P.2d 146 (Or. 1988). The majority opinion describes the "compelling interest" test as a "luxury." *Id.* at 888. This departure may not be unprecedented. Professor McConnell has written that the mission of the Warren and Burger Courts was to "protect democratic society from religion." McConnell, *Crossroads*, *supra* note 2, at 120. According to McConnell, "[t]his set the Religion Clauses apart from the remainder of the Bill of Rights, which protects various nongovernmental activities from the power of democratic majorities." *Id. See also* DANIEL L. DREISBACH, REAL THREAT AND MERE SHADOW: RELIGIOUS LIBERTY AND THE FIRST AMENDMENT 159-64 (1987) (mission of the Warren and Burger courts departs from historical context of the First Amendment.

6. Robert N. Clinton, *Peyote and Judicial Political Activism*, 38 FED. B. NEWS & J. 92 (decision fosters "neo-colonialist control of Indian affairs"); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990) (stating that *Smith* has little grounding in authority, and reduces status of free exercise as a preferred freedom) [hereinafter McConnell, *Free Exercise Revisionism*]; Gloria L. Buxbaum, Note, *Ingestion of Illegal Drugs for Religious Purposes is not Protected by the Constitution*— Employment Division, Department of Human Resources v. Smith, 21 SETON HALL L. REV. 111 (1990) (stating that decision "curtail[s]" constitutional protection); Vance M. Croney, Note, *Secondary Right: Protection of the Free Exercise Clause Reduced by* Oregon v. Smith, 27 WILLAMETTE L. REV. 173 (1991); Danielle A. Hess, Note, *The Undoing of Mandatory Free Exercise Accommodation*—Employment Division, Department of Human Resources v. Smith, 66 WASH. L. REV. 587 (1991) (explaining that *Smith* does not "guarantee that religion exemptions will be granted when a practice is burdened"); Sara A. Juster, Note, *Free Exercise—or the Lack Thereof?* Employment Division v. Smith, 24 CREIGHTON L. REV. 239 (1990) (*Smith* is the latest in line of decisions "chilling . . . the free exercise" of "minority . . . religions."); Eddie Lam, Note, Employment Division, Department of Human Resources of Oregon v. Smith: *The Limits of the Free Exercise Clause*, 16 T. MARSHALL L. REV. 377 (1991); David Leventhal, Note, *The Free Exercise Clause Gets A Costly Workout in* Employment Division, Department of Human Resources of Oregon v. Smith, 18 PEPP. L. REV. 163 (1990) (explaining that criminal laws burden free

recently passed the Religious Freedom Restoration Act (RFRA),[7] which returns the application of the compelling interest test to free exercise jurisprudence. This article will explore the impact of the decision in *Employment Division Department of Human Resources v. Smith*[8] upon a discrete group of citizens: foster children. The analysis requires an examination of the problems inherent in protecting a child's right to free exercise in a foster care system, and whether in fact a child does have a protected right to freely exercise his or her religion.[9] The article will consider the rights of the parents, and how

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exercise the most but are reviewed with the least scrutiny); Sandra A. Pochop, Note, Employment Division, Department of Human Resources of Oregon v. Smith: *Religious Peyotism and the "Purposeful" Erosion of Free Exercise Protections*, 36 S.D. L. REV. 358 (1991) (decision encourages encroachment of religious freedom by state); Tom C. Rawlings, Note, Employment Division, Department of Human Resources v. Smith: *The Supreme Court Deserts the Free Exercise Clause*, 25 GA. L. REV. 567 (1991) (stating that the Court fails in its role of checking abuses by legislators); Steve Rosenstein, Note, Employment Div. v. Smith: *Sacramental Peyote Use and Free Exercise Analysis—Vision Wanted*, 22 U. WEST L.A. L. REV. 185 (1991) (decision hostile to minority religions); Janet V. Rugg & Andria A. Simone, Note, *The Free Exercise Clause:* Employment Division v. Smith's *Inexplicable Departure From the Strict Scrutiny Standard*, 6 ST. JOHN'S J. LEGAL COMMENT. 117 (1990); Diana D. Stithem, Note, *The "Hollow Promise" of the Free Exercise Clause: Denying the Right of Peyote Use in the Native American Church*, 26 LAND & WATER L. REV. 323 (1991); Harry F. Tepker, Jr., *Hallucinations of Neutrality in the Oregon Peyote Case*, 16 AM. INDIAN L. REV. 1 (1991) (stating that the Court goes beyond Constitution to diminish free exercise analysis demanded by First Amendment); Maximilian B. Torres, Note, *Free Exercise of Religion:* Employment Division, Department of Human Resources v. Smith, 14 HARV. J.L. & PUB. POL'Y 282 (1991); *Cause for Concern on Religious Liberty*, CHI. TRIB., Sept. 8, 1992, at 24 (decision may force "smaller sects . . . to give up practices that pose no danger to anyone else"); Stephen Chapman, *Restoring the True Meaning of Religious Freedom*, CHI. TRIB., Apr. 16, 1992, at 27. (decision "shrink[s] . . . constitutional guarantees"); *Repulsing a Threat to Religious Liberty*, CHI. TRIB., Mar. 23, 1992, at 10 (decision "revers[es] . . . constitutional doctrine"). *But see* William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991) (responding to McConnell, *Free Exercise Revisionism*); Ellis West, *The Case Against A Right To Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591 (1990); Bruce Fein, *Perils of the RFRA Remedy*, WASH. TIMES, Sept. 24, 1992, at G1 ("[I]n practice, the compelling interest standard has proven utterly idiosyncratic in application."); Bruce Fein, *Dubious Defense of Faith?*, WASH. TIMES, Apr. 23, 1991, at G1 ("decision should be laudable to those who prefer a secular to a theocratic state").

7. Religious Freedom Restoration Act of 1993, Pub. L . No. 103-141, 107 Stat. 1488 (1993) [hereinafter RFRA].

8. 494 U.S. 872 (1990), *rev'g* 763 P.2d 146 (Or. 1988).

9. *See infra* notes 147-93 and accompanying text.

parental rights have been impacted by *Smith*.[10] Finally, the article will consider the possible arguments of states that prefer not to consider religion in making foster care placements.[11] States may argue that the interests of children and parents in the foster care systems must be infringed upon for some greater good.[12]

The central thesis of the article asserts that *Smith* did not affect the test by which a court would consider a challenge by foster care children or their parents of a state's refusal to consider religion in the placement process. Thus, these cases will continue to be analyzed in the same manner regardless of the impact of *Smith* and the Religious Freedom Restoration Act. Parental issues and free exercise claims create what Justice Scalia describes as a "hybrid" analysis in the *Smith* opinion and are therefore factually different than *Smith* which mostly dealt with free exercise claims.[13] Further, under either the "compelling interest" or *Smith* test, states' arguments in *not* considering religion as a factor in foster care placements are unpersuasive at best, and specious at worst. This article concludes that religion *must* be considered as one factor in the placement process, if requested by the parents or the child.

In Plato's "Ideal Commonwealth," all children were to be commonly raised, and no parent was to know his or her own child.[14] Children were to be raised in the sterile environment of the State, in a regimented fashion.[15] The Supreme Court wrote in *Meyer v. Nebraska* that this type of legislative standardization cannot be imposed upon "the people of a State without doing violence to both letter and spirit of the Constitution."[16] However, with the advent of *Smith*, the Supreme Court

10. *See infra* notes 194-232 and accompanying text.
11. *See infra* notes 233-54 and accompanying text.
12. *See infra* notes 255-302 and accompanying text.
13. 494 U.S. at 882.
14. *See* Meyer v. Nebraska, 262 U.S. 390, 401 (1923).
15. *Id.* at 402.
16. *Id. See also* Parham v. J.R., 442 U.S. 584, 602 (1979) (Aristotlean and Spartan models of collectivization of youth rejected as contrary to American tradition and freedoms); Zummo v. Zummo, 574 A.2d 1130, 1135-36 (Pa. Super. Ct. 1990) (stating notion that the best interest of a child may be bureaucratically controlled is rejected as repugnant to American traditions).

radically changed the test by which cases involving free exercise were to be analyzed. The change of analysis could have affected foster care systems in the United States and the ability of parents and children to freely exercise their religious beliefs within that system. Indeed, if the *Smith* opinion had reduced the scrutiny level by which the free exercise challenges to the practices of foster care are analyzed, then it invites states to move toward "standardization" of children in foster care systems.

The goal of this article is to consider the potential impact of the *Smith* opinion on the rights of foster care children and their parents, as well as the consequences of the RFRA. Following the *Smith* opinion, a great number of commentators predicted the end of traditional free exercise protection by the Supreme Court.[17] In response, Congress passed the RFRA, which is designed to replace the compelling interest test discarded by the Court in *Smith*.[18] This article will point out that the RFRA will not affect the analysis applicable to the free exercise concerns of foster care children and their parents. Rather, even under the now defunct *Smith* opinion, these questions are of such character that the compelling interest test would have still been required. This article takes the position that few, if any, state interests will rise to a level sufficient to deny children and their parents the opportunity to have religion considered as a factor in the placement process.

II. *EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES V. SMITH*

Until 1990, no legislature could pass a law that would prohibit the free exercise of religion[19] without a compelling reason for doing so.[20] The test, which is often referred to as the "com-

17. Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1 [hereinafter, Laycock, *Remnants*]; McConnell, *Free Exercise Revisionism*, *supra* note 6, at 1111. *See also* sources cited *supra* note 6.

18. *See* RFRA, Pub. L. No. 103-141, 107 Stat. 1488 (1993).

19. U.S. CONST. amend. I.

20. *See e.g.* Thomas v. Review Bd., 450 U.S. 707, 718 (1981) (the Jehovah's Witnesses); McDaniel v. Paty, 435 U.S. 618, 626-29 (1978) (plurality opinion) (the Baptist Church); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (the Amish); Sherbert v.

pelling interest" test, was severely narrowed by the Supreme Court's opinion in *Smith*.[21]

A. *Background and Facts of* Smith

The interesting and important circumstances giving rise to the *Smith* opinion aid in understanding how and why the Court drafted the opinion. In the early 1980s, Alfred Smith and Galen Black were members of the Native American Church.[22] The Native American Church considers the ingestion of peyote to be a sacrament "similar to the drinking of wine in Christian communion services."[23] Because of the sectarian nature of the use of the drug, many states have exempted the use of peyote by church members in bona fide religious ceremonies from the states' lists of controlled substances.[24] Oregon, the state in which Smith and Black used peyote, has not made such an exemption.[25]

Smith and Black, ironically, were counselors at the Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment.[26] Obviously, such an organization has firm policies regarding drug use by its employees.[27] When it was discovered that Smith and Black ingested peyote at religious services, they were terminated.[28] They were subsequently denied unemploy-

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Verner, 374 U.S. 398, 403 (1963) (the Seventh-day Adventist Church).

21. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990), *rev'g* 763 P.2d 146 (Or. 1988).

22. *Id.* at 874.

23. Pochop, *supra* note 6, at 358. Peyote is a cactus that grows wild in the southwestern United States. "Buttons" of peyote are either chewed or are made into tea. *Id* at 358 n.3 (citing People v. Woody, 394 P.2d 813, 816 (Cal. 1964)). Peyote used in such a fashion acts as a hallucinogenic drug and is listed as a controlled substance in several jurisdictions. *Id* at 358 nn.5-6.

24. *Id.* at 359 & n.8. ("On March 25, 1991, the Idaho legislature passed a bill legalizing the religious use of peyote by members of the Native American Church . . . . Idaho [became] the twenty-fourth state to legitimate its use.") (citation omitted). The federal government has also made such use of peyote legal. 21 C.F.R. § 1307.31 (1990).

25. Pochop, *supra* note 6, at 359 n.9.

26. Employment Div., Dep't of Human Resources v. Smith, 485 U.S. 660, 662 (1988), *on remand*, 763 P.2d 146 (Or. 1988), *rev'd*, 494 U.S. 872 (1990).

27. *Smith*, 485 U.S. at 662 & nn.2-3.

28. *Id.* at 661-62.

ment benefits, and they claimed this denial violated their right to freely exercise their religion.[29]

The Oregon Court of Appeals agreed with Smith and Black,[30] and their decision was affirmed by the Oregon Supreme Court.[31] The United States Supreme Court granted certiorari[32] and remanded to the Oregon Supreme Court for determination by that court whether the sacramental use of peyote violated Oregon law.[33] The Oregon Supreme Court responded that such use was in fact illegal,[34] and the United States Supreme Court once again granted certiorari.[35]

In the majority opinion written by Justice Scalia, the Court fundamentally changed the way it analyzes free exercise challenges. Scalia wrote that a state did not need to justify a law that burdened religious practice by proving a compelling interest.[36] Rather, he said that an individual was required to respect a "valid and neutral law of general applicability"[37] even if that law "proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[38] As will be discussed further, this holding was a departure from earlier decisions, and fundamentally changed the manner in which courts would determine what is protected under the Free Exercise Clause.

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29. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 874 (1990), *rev'g* 763 P.2d 146 (Or. 1988).

30. Smith v. Employment Div., Dep't of Human Resources, 709 P.2d 246 (Or. App. 1985).

31. Smith v. Employment Div., Dep't of Human Resources, 721 P.2d 445, 449-50 (Or. 1986) (citing Sherbert v. Verner, 374 U.S. 398 (1963)); Thomas v. Review Bd., 450 U.S. 707 (1981).

32. Employment Div., Dep't of Human Resources v. Smith, 480 U.S. 916 (1987).

33. Employment Div., Dep't of Human Resources v. Smith, 485 U.S. 660, 673 (1988) ("[B]ecause we are uncertain about the legality of the religious use of peyote in Oregon, it is not now appropriate for us to decide whether the practice is [constitutionally] protected").

34. Smith v. Employment Div., Dep't of Human Resources, 763 P.2d 146, 148 (Or. 1988), *rev'd*, 494 U.S. 872 (1990).

35. Employment Div., Dep't of Human Resources v. Smith, 489 U.S. 1077 (1989).

36. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 879 (1990).

37. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

38. *Id.*

B. *The Importance and Impact of the* Smith *Opinion*

The *Smith* holding was surprising, given the Court's prior decisions in cases like *Sherbert v. Verner*[39] and *Thomas v. Review Board of Indiana Employment Security Division*,[40] where the Court held that laws impacting religious beliefs or practices needed to be sustained by some compelling interest. These cases did not involve questions of "general applicability" or "neutrality." Not only was this holding surprising coming from the Court, but it was particularly surprising that its author was Justice Scalia. Consider Justice Scalia's statement in 1989:

> In such cases as *Sherbert v. Verner*, *Wisconsin v. Yoder*, *Thomas v. Review Bd. of Indiana Employment Security Div.*, and *Hobbie v. Unemployment Appeals Comm'n of Fla.*, we held that the Free Exercise Clause of the First Amendment *required* religious beliefs to be accommodated by granting religion-specific exemptions from otherwise applicable laws.[41]

Now consider Justice Scalia in 1990, writing for the Court in *Smith*: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[42] Thus, *Smith* was a departure not only from previous decisions of the Court, but also seemed to contradict the prior writings of Scalia.[43]

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39. 374 U.S. 398 (1963).

40. 450 U.S. 707 (1981).

41. Laycock, *Remnants*, *supra* note 17, at 3 (quoting Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 38 (1989) (Scalia, J., dissenting) (emphasis in original) (citations omitted)).

42. *Id.* (quoting *Smith*, 494 U.S. at 878-79).

43. Because of this wide departure from accepted First Amendment jurisprudence, the *Smith* opinion has been widely discussed and criticized. *See* Andrew W. Austin, *Faith and the Constitutional Definition of Religion*, 22 CUMB. L. REV. 1 (1991-1992) (decision alters free exercise analysis but offers no definition of religion); Donald R. Frederico, Note, *Constitutional Law—Free Exercise of Religion*, 76 MASS. L. REV. 161 (1991); Galloway, *Basic Free Exercise supra* note 4; James D. Gordon, III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91 (1991); McConnell, *Free Exercise Revi-*

Justice Scalia might respond that there is no contradiction between his statements in *Bullock* and *Smith*. In *Bullock* he refers to beliefs, while in *Smith* he refers to conduct. But this distinction is disingenuous, as no pure belief can ever be regulated. Only conduct may be regulated. In fact, Scalia seems to recognize as much, writing in *Smith*: "the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts . . . ."[44] Nevertheless, according to Scalia, so long as the law is not intended to burden religion, the "compelling interest" test may not be applicable.[45]

The Court did not leave the "compelling interest" test behind entirely. Rather, they salvaged it in at least three specific situations. If the law in question was "non-neutral,"[46] was not "generally applicable,"[47] or if it impacted what Scalia described as a "hybrid" constitutional right,[48] it would still be tested by the tried and true "compelling interest" or "strict scrutiny" test. The Court also retained the "compelling interest" test in cases where the statute in question provided for a system of individualized exemptions.[49] Free exercise, under *Smith*, was the only individual constitutional right that was to be tested by a less searching inquiry than strict scrutiny.[50]

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sionism, *supra* note 6; Laycock, *Remnants*, *supra* note 17.

It is not my purpose to either justify the Court's opinion nor criticize it, but merely to accept it, and to analyze the effect it might have had upon the foster care system.

44. *Smith*, 494 U.S. at 877.

45. *Id.* at 879.

46. *Id.* *See also infra* notes 52-65 and accompanying text.

47. *Id.* *See also infra* notes 52-65 and accompanying text.

48. *Smith*, 494 U.S. at 881. *See also infra* notes 66-72 and accompanying text.

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

50. *See* sources cited *supra* note 6. Indeed, even rights not specifically enumerated in the Constitution, such as the right to marital privacy, received a higher level of protection than free exercise under *Smith*. *Compare* Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that a statute which forbade the use of contraceptives violated the marital right of privacy) *with* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990). This is especially curious given the central role freedom of religion played in the founding fathers' decision to seek independence. *See* IRVING BRANT, THE BILL OF RIGHTS: ITS ORIGIN & MEANING 66-67 (1965); JAMES MADISON ON RELIGIOUS LIBERTY (Robert S. Alley ed., 1985); HUGO L. BLACK, *The Bill of Rights*

C. *Neutrality, Hybrid Claims, and Systems of Exemption*

Justice Scalia, writing for the majority in *Smith*, explicitly stated that the first amendment "has not been offended" if prohibiting free exercise is "merely the incidental effect of a generally applicable and otherwise valid provision."[51] But if a statute, or presumably a state practice, were not neutral or generally applicable, the "compelling interest" test would apply. Similarly, according to the Court, if a challenge involved a "hybrid" claim, that is, if more than one constitutional right were impacted by a single statute or practice, the "compelling interest" test would apply. Finally, the Court wrote that if the state provides for a system of individualized exemptions from the statute or practice in issue, the "compelling interest" test remains applicable.

1. Neutrality and General Applicability

As mentioned above, the Court did not completely eliminate the compelling interest test. If a statute or practice is not neutral or is not generally applicable, the compelling interest test should be applied. The problem is that the terms "neutral" and "generally applicable" are not defined in the *Smith* opinion.

This certainly is not the first time that the Court has stated that a statute should be neutral with regard to religion, although usually the issue of neutrality is seen in Establishment Clause cases.[52] Professor McConnell has stated that if neutrality is properly defined, it will often be at odds with "religious neutrality."[53] Professor Laycock, however, disagrees with McConnell.[54]

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and the Federal Government, in THE GREAT RIGHTS 46-49 (1964).

51. *Smith*, 494 U.S. at 878.

52. *See, e.g.*, Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 109 S. Ct. 3086, 3098-101 (1989). Other cases are collected in Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 2 n.6 (1986). Commentators' works are collected in Steven D. Smith, *Symbols, Perceptions and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 314 n.183 (1987).

53. *See* Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146, 149 n.17 (1986) [hereinafter McConnell, *Neutrality*].

54. Douglas Laycock, *Formal, Substantive, and as Aggregated Neutrality Toward*

Laycock says "[w]hen I say government should be neutral towards religion, I mean to include the claim that it should not express an opinion about religion."[55] But it may be that a government can pass a statute with the intention of burdening religion, or at least clearly directed at restricting religious liberty, and not explicitly state an opinion about religion.

It is this realization that gives rise to the categories of "substantive" versus "formal" neutrality. Philip Kurland provides the best definition of "formal" neutrality:

> The [Free Exercise and Establishment] clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden.[56]

Commentators have rejected formal neutrality as a valid test.[57] In *Smith*, however, the Court seems to have adopted formal neutrality. The Court said that the government could regulate Mass for a good reason, for a bad reason, or for no reason at all, so long as the regulation was facially neutral and did not single out religion.[58]

Despite its apparent adoption in *Smith*, there can be virtually no doubt that previously the Court did not favor formal neutrality. In *Wisconsin v. Yoder*, for example, the Court said "[A] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."[59] In his dissent in *Sherbert v. Verner*, Justice Harlan wrote:

Religion, 39 DEPAUL L. REV. 993, 995 (1990) [hereinafter Laycock, *Neutrality*].

55. *Id.* at 997.

56. Philip Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961).

57. *See* Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 24 (1978). *But see* Mark Tushnet, *"Of Church and State and the Supreme Court": Kurland Revisited*, 1989 SUP. CT. REV. 373 (1989).

58. *See* Employment Div. v. Smith, 494 U.S. 872, 879 (1990).

59. Wisconsin v. Yoder, 406 U.S. 205, 220 (1971) (citing Sherbert v. Verner, 374 U.S. 398 (1963)).

> The constitutional obligation of "neutrality" . . . is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation. There are too many instances in which no such course can be charted, too many areas in which the pervasive activities of the State justify some special provision for religion to prevent it from being submerged by an all-embracing secularism.[60]

Professor Laycock makes two observations about the adoption of formal neutrality. First, he states that if formal neutrality were the policy adopted by the Court, the National Prohibition Act's exemption for the use of sacramental wine would have been unconstitutional.[61] Second, he states that any aid given to secular private schools would also have to be given to religious schools on exactly the same terms.[62]

The second type of neutrality is known as "substantive neutrality." Laycock defines substantive neutrality as follows: "[T]he religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance."[63] Substantive neutrality seems to be more in keeping with our tradition of religious liberty, in that it leaves the choice of religion up to the individual.[64] This choice is left as private as possible, with no interference by the government, either encouraging or discouraging.[65] Despite the appeal of substantive neutrality, it appears for the moment to have been rejected by the Supreme Court in favor of formal neutrality.

Thus, if a statute or practice under which foster care children or their parents were denied the opportunity to express religious preferences in placement was formally non-neutral the compelling interest test would apply. Such a regulation would have to explicitly state that religion will not be considered as a

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60. *Sherbert*, 374 U.S. at 422 (Harlan, J., dissenting).

61. Laycock, *Neutrality*, *supra* note 54, at 1000 (citing An Act to Prohibit Intoxicating Beverages, ch. 85 § 6, 41 Stat. 305, 311 (1919)).

62. *Id.* at 1001.

63. *Id.*

64. *See* Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839 (1986) [hereinafter Kurland, *Origins*].

65. Laycock, *Neutrality*, *supra* note 54, at 1003.

factor in the placement process. Such an explicit denial of the opportunity to express religious preference would be non-neutral, in that it would explicitly denigrate religion—religious belief would be openly and specifically discouraged.

General applicability is more difficult to analyze than neutrality. Is a regulation that affects only those within the foster care system generally applicable? Or would the statute be considered "generally applicable" if it applied only to those without religious beliefs? One might assume that the former would be considered "generally applicable" while the latter would not. Neither the Court nor the commentators provide any guidance on this issue. Perhaps "generally applicable" is meant not as a separate issue from neutrality, but rather as a part of neutrality. In other words, if a statute is not formally neutral because it specifically targets religion, it is not generally applicable as it only applies to people with religious beliefs.

2. Hybrid Claims

In *Smith*, one gets the impression that the Court would have liked to simply do away with the "compelling interest" test for free exercise challenges entirely. But this would have been too bold a move. Facing an onslaught of stare decisis, the Court relented that "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections."[66] Thus, the Court stated that when faced with such a "hybrid" challenge, courts should continue to apply the "compelling interest" test.[67]

In a foster care setting, many interests are combined. As this article will later demonstrate, parents have a right to free exercise, a right to direct the upbringing of their children, and a right to affect their children's religious training.[68] Whether these are three separate rights, or simply one right broken into

66. *Smith*, 494 U.S. at 881.
67. *Id.* at 882.
68. *See infra* notes 194-219 and accompanying text.

three parts, is unclear. Children also have free exercise rights.[69] However, the degree of constitutional protection of these rights remains unclear. Finally, foster care parents also have free exercise rights.[70] Thus, the denial of the opportunity to express a religious preference in a foster care setting would impact the rights of many different parties. This appears to be a good example of a "hybrid" situation in which the Court would apply the compelling interest test.

Indeed, the Court used free exercise rights and parental rights to direct a child's upbringing as a paradigm for a "hybrid" right deserving protection of the compelling interest test.

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as . . . the right of parents, acknowledged in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), to direct the education of their children.[71]

This is perhaps the strongest argument for the proposition that even under *Smith*, a denial of the opportunity to express religious preference in foster care placements must be tested by the compelling interest standard. Clearly, both the free exercise rights and the parents' right to direct the education of their children are impacted in making foster care placements; thus, a burden on such rights would be analyzed under the compelling interest test.

3. A System of Individualized Exemptions

The final attribute of a regulation that will engage the "compelling interest" test is a provision for individualized exemptions.[72] For example, if in the *Smith* case the Oregon statute which prohibited the ingestion of peyote had provided that

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69. *See infra* notes 147-93 and accompanying text.
70. *See infra* notes 213-32 and accompanying text.
71. *Smith*, 494 U.S. at 881 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972)).
72. *Id.* at 884.

individuals would be exempt if they obtained a doctor's certification of their medicinal need for the drug, the statute would provide for a system of individualized exemptions. The thought here is that if the statute provides exemptions for certain reasons, such as medical treatment, then it should provide similar exemptions for religious purposes, unless the state can show an overriding compelling interest.

In the foster care system, many individualized considerations are made when placing a child. These considerations include factors such as age, gender, race, location of natural family, and special health needs. While these may not be considered "exemptions" from any generalized statute, the argument can be made that if the state considers each of these factors, it should not be allowed to deny similar consideration of religion without showing a compelling interest.

D. *The Impact of* Smith: *"If your religious belief is burdened by this, too bad."*[73]

The *Smith* decision significantly impacted religious issues in the United States. For example, the Occupational Safety and Health Administration canceled an exemption from wearing hard hats previously granted to Old Order Amish construction workers; Quaker organizations were ordered to collect taxes from employees who refused to pay such taxes because of religious opposition to war; and a federal trial court's pre-*Smith* decision ordering state prison officials not to serve Muslim inmates pork was remanded for a new trial.[74]

Commentators have imagined other possible consequences as well. Under *Smith*, the use of sacramental wine by minors could constitutionally be banned;[75] school dress codes might prevent the wearing of religious garments such as turbans and

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73. *See Crier & Company* (CNN television broadcast, June 26, 1992) (Nadine Strossen, President of the American Civil Liberties Union, commenting on the essence of *Smith*).

74. William D. Siegel, *High Court Erodes Religious Rights, But Congress Has Legislation That Can End The Threat*, NEWSDAY, Apr. 16, 1992, at 113.

75. *Id.*

yarmulkes;[76] public schools might be barred from allowing unexcused absences on religious holidays;[77] anti-discrimination statutes might be held to cover churches, requiring them to ordain female and homosexual clergy;[78] parochial schools could be forced to distribute condoms;[79] religious hospitals could be forced to perform abortions,[80] and religious sermons on issues of political significance could lead to the revocation of tax exemptions.[81]

In response to this parade of horribles, another commentator lauded the development of *Smith*, and countered the list with one of his own:

> Contemplate the ramifications of a contrary ruling [to *Smith*]. Christian Science parents could with impunity cause the deaths of fetuses or infants by refusing to authorize blood transfusions or other medical treatment because they are contrary to religious creed. Jehovah's Witnesses could employ children as religious proselytizers in contravention of child labor laws, with no penalty. Muslims could marry four women, commit rape unwitnessed by four persons and cease government employment to make a pilgrimage to Mecca without adverse consequences. Physicians acting from religious scruples would be authorized to ignore state laws requiring that abortion referral information be offered to health-endangered mothers.[82]

Notwithstanding these examples of the consequences of a holding contrary to *Smith*, most commentary has been critical of the opinion.[83]

Since the *Smith* opinion was handed down, two interesting events have transpired. First, a survey of state and federal cases involving free exercise claims reveals that many judges

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76. *Id.*; *see* McConnell, *Crossroads*, *supra* note 2, at 138.
77. Siegel, *supra* note 74, at 113.
78. *Id.*; *see* McConnell, *Crossroads*, *supra* note 2, at 138.
79. Siegel, *supra* note 74, at 113.
80. *Id.*; *see* McConnell, *Crossroads*, *supra* note 2, at 138.
81. *See* McConnell, *Crossroads*, *supra* note 2, at 138.
82. Bruce Fein, *Dubious Defense of Faith?*, WASH. TIMES, Apr. 23, 1991, at G1.
83. *See* sources cited *supra* note 6.

are reluctant to follow the new analysis.[84] Second, the opinion has resulted in a legislative return to the "compelling interest" test.[85]

1. Judicial Resistance to *Smith*

An interesting phenomenon developed after the *Smith* decision. Some state and lower federal courts demonstrated a reluctance to apply the test enunciated in *Smith*. Perhaps the best example of this is the District Court of Rhode Island case of *Yang v. Sturner*.[86] In that case, the plaintiff's twenty-three-year-old son had suffered a seizure while sleeping. He was rushed to the hospital, but died two days later. Since doctors were unable to determine the cause of either the seizure or the death, an autopsy was performed pursuant to state law,[87] but without the permission or knowledge of the man's parents.

The young man and his parents were members of the Hmong community, whose deeply held religious convictions prohibited any mutilation of the body, including autopsies or the removal of organs. They challenged the state statute which provided for immediate autopsies without knowledge or permission by the family, claiming that it violated their free exercise rights.

Applying the analytical framework contained in *Wisconsin v. Yoder*[88] and *Sherbert v. Verner*,[89] the court held that the interests of the state in this case "fall far short of being compelling."[90] As a result, the court concluded that the state had violated the Yangs' religious beliefs which are protected under the Free Exercise Clause of the First Amendment. This decision was reached just three months before the United States Supreme Court announced the opinion in the *Smith* case on April 17, 1990. The *Yang* court had to take the newly released *Smith*

84. *See infra* notes 86-120 and accompanying text.
85. *See infra* notes 121-30 and accompanying text.
86. 728 F. Supp. 845 (D.R.I. 1990), *vacated in part*, 750 F. Supp. 558 (D.R.I. 1990).
87. R.I. GEN. LAWS § 23-4-4 (1992).
88. 406 U.S. 205, 219 (1972).
89. 374 U.S. 398, 402 (1963).
90. *Yang*, 728 F. Supp. at 856.

case into its consideration when the court considered the issue of damages later in November of 1990.

On November 9, 1990, the judge in *Yang* vacated that part of his earlier opinion which found a violation of the plaintiffs' protected First Amendment rights.[91] "It is with deep regret that I have determined that the *Employment Division* case mandates that I recall my prior opinion."[92] The judge was clearly displeased with the *Smith* opinion, and for a lower federal court judge, was uncharacteristically critical of the Court's decision. "While I feel constrained to apply the majority's opinion to the instant case, I cannot do this without expressing my profound regret and my own agreement with Justice Blackmun's forceful dissent."[93] The judge concluded by rhetorically asking: "what is left of Free Exercise jurisprudence when one can attack only laws explicitly aimed at a religious group?"[94]

Although the judge in *Yang* felt constrained by *Smith*, other courts have clearly not felt so constrained. In *Zobrest v. Catalina Foothills School District*,[95] the Ninth Circuit considered whether the denial of a state funded sign language interpreter for a deaf student enrolled in a private religious school violated the student's free exercise rights. The court stated that the imposition of a burden on an individual's right to free exercise must be justified by some compelling state interest.[96] The court did not mention or cite *Smith*. The court held that the state did show a compelling interest in wanting to avoid a conflict with the Establishment Clause.[97] The dissenting judge found that the state's concern about the Establishment Clause was not warranted, and thus did not justify the burden being placed upon the student's right to freely exercise his religion.[98]

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91. Yang v. Sturner, 750 F. Supp. 558 (1990).
92. *Id.* at 558.
93. *Id.* at 559.
94. *Id.*
95. 963 F.2d 1190 (9th Cir. 1992).
96. *Id.* at 1196 (citing Sherbert v. Verner, 374 U.S. 398, 406 (1963)).
97. *Id.* at 1197. This Establishment Clause versus Free Exercise Clause debate is discussed with regard to foster care in Part III. *See infra* notes 266-302 and accompanying text.
98. *Id.* at 1205.

The dissenting judge also did not mention or cite *Smith*.

The significance of the *Zobrest* opinion is that the Ninth Circuit, in a case two years after the *Smith* decision, did not feel that it was necessary to consider whether the applicable statute[99] was neutral, generally applicable, or provided a system of exemptions pursuant to the guidelines presented in *Smith*.[100] This was a federal case, based upon a federal constitutional issue, and yet the court declined to apply the analytical framework provided by the United States Supreme Court only two years earlier.

In *Niebla v. County of San Diego*,[101] the Ninth Circuit considered whether the State of California could legitimately force a Jehovah's Witness to receive a blood transfusion. In this case, a county social worker obtained an emergency transfusion order because a fifteen-year-old girl and her parents refused to allow blood transfusions based on their religious beliefs. As in the *Zobrest* case, the court was able to neatly skirt the application of *Smith* by merely finding a compelling interest, without discussing the question of whether such a high interest was required. In *Niebla*, the court held that "[f]ree exercise of religion, bodily autonomy and parental rights yield before the compelling interest the state has in protecting children from serious health problems."[102] By finding a compelling interest, the court was able to decide the case without considering the proper test.

The Tenth Circuit Court of Appeals had to decide a more difficult case. In *United States v. Boyll*,[103] the court was faced with a case very much like *Smith*. Only in this case, the defendant was prosecuted under federal law,[104] rather than

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99. The Federal Education of the Handicapped Act, 20 U.S.C. § 1401(a)(1) (1975).

100. The Eighth Circuit decided a free exercise case in 1992, and failed to consider or apply the *Smith* precedent in that case as did the Ninth Circuit in *Zobrest*. *See* Bear v. Nix, 977 F.2d 1291 (8th Cir. 1992) (denying inmate who wished to practice Native American Religion the opportunity to do so based upon the analytical framework of O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987)).

101. No. 90-56302, 1992 U.S. App. LEXIS 15049 (9th Cir. June 23, 1992).

102. *Id.* at *11 (citing Jehovah's Witnesses v. King County Hosp., 278 F. Supp. 488, 504-05 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968); LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1363 (2d ed. 1988)).

103. No. 91-2235, 1992 U.S. App. LEXIS 14537 (10th Cir. June 16, 1992).

104. *See* 21 U.S.C. § 812(c) (1988 & Supp. II 1990); 21 C.F.R. § 1307.31 (1992).

state law. Under federal law, the possession of peyote by a member of the Native American Church was exempted from the standard law regarding possession of a controlled substance.[105] However, Boyll was not a Native American.

The case presented the question of whether the government could require a person to be a Native American in order to obtain the religious exemption provided in the statute. The Tenth Circuit quoted at length from the trial court decision in finding that the government's interpretation of the statute was improper. The lower court had stated:

> Since the use of peyote by Native American Church members is the very essence of their religious beliefs, the proposed racially restrictive reading of 21 C.F.R. § 1307.31 would have the sure effect of imposing a racial exclusion to membership in the Native American Church itself. To exclude individuals of a particular race from being members of a recognized religious faith is offensive to the very heart of the First Amendment.[106]

Smith is nowhere to be found in the *Boyll* opinion.

Admittedly, none of the above cases involved pure free exercise issues. They allowed the Eighth, Ninth, and Tenth Circuits to decide the issues that were presented without discussing *Smith*. In *Zobrest* and *Niebla*, it was simple for the court to merely hold that the State had a compelling interest, and therefore regardless of which test applied, the burden to free exercise was justified. The *Boyll* court had the toughest time avoiding *Smith*, mainly because its facts were so similar to *Smith*. Despite the similarities the court was apparently uncomfortable with *Smith*, and therefore unwilling to apply it.

It is undeniable that *Smith* was unpopular with the courts and commentators.[107] In some cases, it was possible for a court to avoid *Smith* by simply characterizing the issue as a state, rather than a federal, constitutional issue.[108] Here, the

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105. *See* 21 U.S.C. § 812(c).

106. United States v. Boyll, 1992 U.S. App. LEXIS 14537, at *9 (10th Cir. June 16, 1992) (citing Waltz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970)).

107. *See* sources cited *supra* note 6.

108. *See* Minnesota v. Hershberger, 462 N.W.2d 393 (Minn. 1990); *see also* Tony

state courts fashioned whatever analytical framework they chose.

In *Donahue v. Fair Employment and Housing Commission*,[109] a landlord defended his refusal to rent an apartment to an unmarried couple on First Amendment grounds. The court noted the development of First Amendment law in *Smith*, but refused to apply the new *Smith* analysis. The court reasoned that although the defense was based on a federal constitutional right, it was also based upon independent state constitutional grounds. The court felt that although *Smith* was now the federal standard, their own state free exercise test remained the "balancing test and compelling state interest analysis."[110]

A similar issue was presented before the Maine Supreme Court in *Rupert v. City of Portland*.[111] This was another case involving the Native American Church. In *Rupert*, the plaintiff was arrested for possession of a small quantity of marijuana and a marijuana pipe. The charges were dismissed when the arresting officer failed to appear at a preliminary hearing. The plaintiff subsequently sought the return of his pipe. The police department informed the plaintiff that as drug paraphernalia the pipe was subject to confiscation under the Maine Drug Paraphernalia Act.[112]

The plaintiff sued for the return of his pipe, arguing that he used marijuana only for religious purposes and therefore, his use of the pipe was protected by the Free Exercise Clause of both the state and federal constitutions.[113] The court noted

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Maruo, *Congress Joins Fight on Religious Limits*, USA TODAY, Apr. 17, 1991, at 1A (discussing the Minnesota Amish case).

109. 2 Cal. Rptr. 2d 32 (Cal. App. 1991).

110. *Id.* at 42 (citing Auto Equity Sales v. Superior Court, 369 P.2d 937 (Cal. 1962)). The dissenting judge felt that before a court applied a different state standard from that applicable to a similar provision in the federal Constitution, there must be "cogent reasons" for doing so. *Id.* at 51 (citing Raven v. Deukmejian, 801 P.2d 1077 (Cal. 1990) (quoting Gabrielli v. Knickerbocker, 82 P.2d 391 (Cal. 1938))).

111. 605 A.2d 63 (Me. 1992).

112. ME. REV. STAT. ANN. tit. 17A, § 1111-A (West 1983 & Supp. 1991).

113. The plaintiff was also the sole member of the New World Church, and as such had appointed himself "medicine pipe registrar." *Rupert*, 605 A.2d at 65. In that capacity the plaintiff had registered his marijuana pipe as a "medicine pipe." *Id.* The

that under one of its recent decisions, the state must show a "compelling public interest" to justify burdens upon sincerely held religious beliefs.[114] The court noted the development of *Smith*, but held that "[w]e have no reason in this case to decide whether we in applying the Maine Free Exercise Clause will change course to follow the Supreme Court's lead in *Smith*."[115] The court justified its avoidance of *Smith* by finding that the state had a compelling interest in preventing the distribution and use of illegal drugs, including marijuana.[116]

Not all such cases have been reluctant to apply *Smith*. For example, the Ohio Court of Appeals was faced with a case factually similar to the *Rupert* case in *State v. Flesher*.[117] In *Flesher*, the defendant was pulled over by a police officer who noticed a partially burned marijuana cigarette in the car's ashtray. The police officer searched the car and found a bag of marijuana seeds, an unused marijuana cigarette and other partially burned marijuana cigarettes.[118] The defendant claimed that he used marijuana solely for religious purposes, and analogized his case to *People v. Woody*,[119] the famous pre-*Smith* California Supreme Court decision upholding the right of members of the Native American Church to use peyote in their religious ceremonies. However, the court looked at the recent decision in *Smith*, and in a one-sentence holding denied the relief sought: "[t]he *Smith* case therefore reduces appellant's arguments to a puff of smoke."[120]

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plaintiff held a Master of Divinity degree from Harvard University. While at Harvard, the plaintiff had written a thesis on the historical use of hallucinogenic mushrooms in Indian religion. *Id.* Among other things, the plaintiff claimed to have been a graduate of the United States Air Force Academy and a former United States Air Force officer, as well as a graduate of the Georgetown University Law Center. *Id.* at 65 n.2.

114. *Rupert*, 605 A.2d at 65-66 (citing Blount v. Department of Educ. & Cultural Servs., 551 A.2d 1377 (Me. 1988)).

115. *Id.* at 66 n.3.

116. *Id.* at 66.

117. 585 N.E.2d 901 (Ohio Ct. App. 1990).

118. *Id.* at 902.

119. 394 P.2d 813 (Cal. 1964).

120. *Flesher*, 585 N.E.2d at 903.

2. A Legislative Return to "Compelling Interest"

In response to the *Smith* opinion, a movement was undertaken in Congress to replace the *Smith* standard with the "old" compelling interest standard.[121] The proposed bills explicitly stated that "in *Employment Division of Oregon v. Smith* the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."[122] The bills then stated that "the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* is a workable test"[123] and that the "Government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is essential to further a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[124] In introducing the Religious Freedom Restoration Act of 1992 to the Senate, Senator Kennedy stated:

> America was founded as a land of religious freedom and a haven from religious persecution. Two centuries later, that founding principle is suddenly in danger. Religious liberty is damaged each day the *Smith* decision stands. Since *Smith*, more than 50 cases have been decided against religious claimants, and harmful rulings are likely to continue.[125]

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121. Religious Freedom Restoration Act of 1991, H.R. 2797, 102d Cong., 1st Sess. (1991); Religious Freedom Restoration Act of 1992, S. 2969, 102d Cong., 2d Sess. (1992); *see* Michael Hirsley, *Churches Battle for Return to Past*, CHI. TRIB., Aug. 9, 1991, at 9; Ruth Marcus, *Reins on Religious Freedom?; Broad Coalition Protests Impact of High Court Ruling*, WASH. POST, Mar. 9, 1991, at A1; Stephen J. Solarz, *The Court's Erosion of Religious Freedom*, NEWSDAY, Aug. 23, 1990, at 71.

In addition to the Religious Freedom Restoration Act, Senator Inouye (D-HI) introduced an amendment to the American Indian Religious Freedom Act of 1978 on January 14, 1991. The amendment does not specify the test by which free exercise cases should be decided, but mentions the narrowing of free exercise rights of Native Americans by the United States Supreme Court. The Bill would require many procedural safeguards for Native American religious organizations, and appears to be a response primarily to the Court's opinion in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). *See* 137 CONG. REC. 5763 (daily ed. January 14, 1991).

122. H.R. 2797, § 2(a)(4); S. 2969, § 2(a)(4).

123. H.R. 2797, § 2(a)(5); S. 2969, § 2(a)(5).

124. H.R. 2797, § 3(b); S. 2969, § 3(b).

125. 138 CONG. REC. S9821-22 (daily ed. July 2, 1992) (statement of Sen. Kenne-

The Religious Freedom Restoration Acts of 1991 and 1992 were met by a "counter-bill" called the Religious Freedom Act of 1991.[126] This bill was introduced on November 26, 1991 by Representative Christopher H. Smith (R-N.J.). The bill essentially mirrored the provisions of the Religious Freedom Restoration Acts of 1991 and 1992, replacing the *Smith* test with the "compelling interest" test, but also went a step further. The Religious Freedom Act of 1991 contains a provision that specifically prevents use of the legislation to secure a right to an abortion or abortion funding.[127] In addition to the abortion issue, the drafters of the bill were concerned about the tax status of religious organizations.[128]

The Religious Freedom Restoration Act of 1991 proved more popular in the House than its counterpart, the Religious Freedom Act of 1991.[129] The Religious Freedom Restoration Act (RFRA) won passage on November 15, 1993.[130] The new law has the effect of requiring the compelling interest test to be applied to all free exercise cases. As discussed earlier, however, the *Smith* decision did not change the analysis that would be applied in a foster care context. Consequently, the seesaw between applicable standards provided by *Smith* and the RFRA

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dy). Senator Kennedy also stated that the Bill had the support of numerous religious groups, including the American Civil Liberties Union, the American Jewish Committee, the Baptist Joint Committee, the Christian Legal Society, the Church of Jesus Christ of Latter-day Saints, Coalitions for America, Concerned Women for America, the Episcopal Church, the Home School Legal Defense Association, the National Association of Evangelicals, the National Council of Churches, People for the American Way, and the Southern Baptist Convention. *Id.*

126. H.R. 4040, 102d Cong., 1st Sess. (1991).

127. Representative Smith stated that the ACLU and the Religious Coalition For Abortion Rights were using free exercise of religion claims to attack "pro-life" laws in Utah, Guam, Louisiana, Michigan, and New York. *See* 137 CONG. REC. E4186-87 (daily ed. Nov. 26, 1991) (remarks of Rep. Smith).

128. *Id.* at E4187.

129. *See* Carol Emert, *Apostle Asks Senate Panel To Support Religious Freedom Bill*, STATES NEWS SERVICE, Sept. 18, 1992; Carol Emert, *Lawmakers Debate Religious Freedom Bill*, STATES NEWS SERVICE, May 14, 1992; Carol Emert, *Mormon Elder Addresses Congressional Panel Head, Urges Support For Religious Freedom Bill*, STATES NEWS SERVICE, May 13, 1992; Robert P. Hey, *Religious Freedom Legislation Could Snag on Abortion Controversy*, CHRISTIAN SCI. MONITOR, July 1, 1991, at 8; Larry Witham, *Abortion Clouds Bill on Religion*, WASH. TIMES, Mar. 2, 1992, at A6.

130. Pub. L. No. 103-141, 107 Stat. 1488 (1993).

should have little ultimate impact upon consideration of religion as a factor in foster care placements. In the next section, this article argues that the participants in the foster care system have a compelling interest in having their religious beliefs considered during the placement process.

III. CONFLICTING CONSTITUTIONAL INTERESTS

Foster care in the United States is an attempt by the states to protect and care for children whose natural parents are otherwise unable to do so.[131] The overriding concern in placing a child into a foster care home is what is in the best interest of the child.[132] This concern can only be adequately addressed when a consideration for the child's religious background is taken into consideration.[133]

Approximately seventy percent of all children in foster care systems are placed in private homes with a family.[134] For forty percent of the children in foster care, a return to the natural

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131. *See* STANFORD N. KATZ, WHEN PARENTS FAIL, THE LAW'S RESPONSE TO FAMILY BREAKDOWN 93-95 (1971).

132. LYNN D. WARDLE ET AL., 2 CONTEMPORARY FAMILY LAW § 11.08 (1988). Other standards are sometimes used. For example, some courts will look for "changed circumstances." VT. STAT. ANN. tit. 33, § 5532 (1991); *In re* Certain Neglected Children, 349 A.2d 228, 229 (Vt. 1975) (citing Gokey v. Gokey, 248 A.2d 738, 739 (1968)). Another example is "the child will not be endangered [by the specific harms that justified removal] if returned home." INSTITUTE OF JUDICIAL ADMINISTRATION & THE AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO ABUSE AND NEGLECT § 7.5 (1977). Finally, some courts use a test that determines whether "returning custody to the parent would . . . be detrimental to the child." *In re* Audrey D., 160 Cal. Rptr. 802, 805 (Cal. Ct. App. 1979) (holding that the parent seeking the return of the child has the burden of proving that such action will not be detrimental to the best interests of the child). *See also* sources cited *infra* note 144.

133. Early foster care systems in the United States were formed with the actual promotion of religion in mind, and agencies conducted religious meetings for the children. SUSAN TIFFIN, IN WHOSE BEST INTEREST? 88 (1982). In fact, one of the goals of systems such as the New York Children's Aid Society in the latter half of the 19th century was to place Catholic children in Protestant homes precisely to strip them of their religious beliefs. *Id.* at 91. Although this intent is no longer present, the effect may remain, without any opportunity for the child or his or her parent to affect the outcome of the situation.

134. *See* WARDLE, *supra* note 132, at § 11.06; (citing Child Welfare Statistical Notes No. 1 at 4 (December, 1983)). Further, the population of children in foster care has grown by nearly 50 percent since 1985, to 407,000 in 1990. Larry Rohter, *To Save or End a Troubled Parent's Rights*, N.Y. TIMES, Oct. 4, 1992, §4.

family is the ultimate goal,[135] and the state seeks to minimize the disruption in the child's life by placement with a similar family. Forty-nine percent of all foster care children do ultimately return to their natural family.[136] In fifty percent of the cases, a child will remain in foster care for three years or more.[137] After a child has been in foster care for three years or more, the chances of leaving the system are greatly diminished.[138]

These statistics indicate that although foster care is considered to be a temporary transfer of custody from the parents, it often is not.[139] In addition, foster care placement will have a deep and lasting effect upon the child.[140] Because most foster care children will be in foster homes at a time in which their religious beliefs are formed, foster care will often have a profound impact upon those beliefs.[141] Thus, it would be desirable to place children into homes where their expressed religious beliefs would be nurtured.[142]

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135. *See* WARDLE, *supra* note 132 at, § 11.06.

136. *Id.*

137. *Id.* at § 11.06 n.9 (citing Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 626-27 (1976)).

138. *Wardle, supra* note 132, at § 11.06 (citing FOSTER CHILDREN IN THE COURTS 360 (Mark Hardin ed., 1983)). In 1987, only 800 of the 29,000 foster children in New York City were adopted. Ilene Barth, *The Key to Halting Child Abuse: All of Us*, NEWSDAY, Jan. 1, 1989, at 9.

139. *See* Mark Hardin, *Legal Placement Options to Achieve Permanence for Children in Foster Care, in* FOSTER CHILDREN IN THE COURTS (Mark Hardin ed., 1983). Even in situations where the child will not be in foster care for any significant length of time, researchers agree that one of the key elements in the healthy development of a child is stability. *See* sources cited *infra* notes 144-48. Therefore, the foster care system should seek to limit the amount of disruption in the child's life, and place the child in a home as much like the child's "natural home" as possible.

140. *See* JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1973).

141. Wallace v. Jaffree, 472 U.S. 38, 60 n.51 (1985) (citing Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 227 (1948) (Frankfurter, J., concurring); Abington School Dist. v. Schempp, 374 U.S. 203, 290 (1963) (Brennan, J., concurring); Marsh v. Chambers, 463 U.S. 783, 792 (1983)); *see also* Edwards v. Aguillard, 482 U.S. 578, 584-85 (1987); Gregory A. Horowitz, Note, *Accommodation and Neutrality Under the Establishment Clause: The Foster Care Challenge*, 98 YALE L.J. 617, 621 (1989).

142. The trial court in the *Zummo* case found that "Judaism and Catholicism are irreconcilable; and, exposure to both religions might 'unfairly confuse and disorient

In today's society, however, it is not always possible to achieve the most desirable placements.[143] Nevertheless, from a legal standpoint, the issue of what the state must do to protect the rights of the parties involved arises.[144] Leo Pfeffer identified three parties with an interest in the consideration of religion when considering child custody issues.[145] The interest is shared among the parents, the child, and the community, according to Pfeffer.[146] But to say that these parties have an interest in how or where a child is placed, does not answer the question of who has a right to direct how or where a child is placed.

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the children, and perhaps vitiate all benefits flowing from either religion.'" Zummo v. Zummo, 574 A.2d 1130, 1142 (Pa. Super. Ct. 1990) (quoting Zummo v. Zummo, 121 Montg.Co.L.R. at 253-56 (1988)).

143. Most courts and statutes impacting child custody issues provide that the most important consideration is the "best interest of the child." ALA. CODE § 12-15-71 (1992); ALASKA STAT. §25.20.060 (1992); ARIZ. REV. STAT. ANN. § 8-108 (1992); ARK. CODE ANN. § 9-9-220 (Michie 1992); CAL. WELF. & INST. § 16520 (West 1993); COLO. REV. STAT. § 19-1-115 (1993); CONN. GEN. STAT. § 46b-56 (1993); DEL. CODE ANN. tit. 13, § 722 (1992); FLA. STAT. ch. 61.13 (1993); HAW. REV. STAT. § 571-46 (1992); IDAHO CODE § 32-717 (1992); ILL. REV. STAT. ch. 40, para. 602 (1992); IND. CODE ANN. § 31-1-11.5-21 (Burns 1992); IOWA CODE § 598.41 (1991); KAN. STAT. ANN. § 38-1563 (1991); KY. REV. STAT. ANN. § 199.510 (Michie/Bobbs-Merrill 1992); LA. CH. CODE ACT 1255 (West 1992); ME. REV. STAT. ANN. tit. 22, § 4036 (West 1992); MD. CODE ANN., FAM. LAW § 5-312 (1992); MASS. ANN. LAWS ch. 208, § 31 (Law. Co-op. 1992); MICH. COMP. LAWS § 710.39 (1991); MINN. STAT. § 257.025 (1992); MISS. CODE ANN. § 93-5-24 (1991); MO. REV. STAT. § 452.375 (1991); MONT. CODE ANN. § 40-4-212 (1992); NEB. REV. STAT. § 42-364 (1991); NEV. REV. STAT. § 125.480 (1991); N.H. REV. STAT. ANN. § 169-C:23 (1991); N.J. REV. STAT. § 9:2-4 (1992); N.M. STAT. ANN. § 40-4-9 (Michie 1992); N.Y. DOM. REL. LAW § 115-b (Consol. 1993); N.C. GEN. STAT. § 50-13.2 (1992); N.D. CENT. CODE § 14-05-22 (1991); OHIO REV. CODE ANN. § 3109.04 (Baldwin 1992); OKLA. STAT. tit. 10, § 21.1 (1991); OR. REV. STAT. § 107.137 (1991); 23 PA. CONS. STAT. § 5303 (1992); R.I. GEN. LAWS § 15-5-16 (1992); S.D. CODIFIED LAWS ANN. § 25-5-10 (1992); TENN. CODE ANN. § 37-1-166 (1992); UTAH CODE ANN. § 30-3-10 (1992); VT. STAT. ANN. tit. 15, § 665 (1991); VA. CODE ANN. § 16.1-278.15 (Michie 1992); WASH. REV. CODE § 26.10.100 (1991); WIS. STAT. § 767.24 (1990); Mock v. Mock, 369 S.E.2d 255 (Ga. 1988); Moore v. Moore, 386 S.E.2d 456 (S.C. 1989); Mormanis v. Mormanis, 296 S.E.2d 680 (W. Va. 1982).

144. For example, the Supreme Court has held that a parent's right to affect the religious upbringing of the child may not be disturbed absent a showing of a "substantial threat" of "physical or mental harm to the child, or to the public safety, peace, order, or welfare." *Zummo*, 574 A.2d at 1138 (citing Wisconsin v. Yoder, 406 U.S. 205, 230 (1972)).

145. Leo Pfeffer, *Religion in the Upbringing of Children*, 35 B.U. L. REV. 333, 338-39 (1955).

146. *Id.*; *see also* Andrew J. Kleinfeld, *The Balance of Power Among Infants, their Parents and the State*, 4 FAM. L.Q. 319 (1970).

A. *A Child's Right to Affect his or her Religious Upbringing*

Until recently, the right of a child to affect his or her own religious upbringing has not been recognized. Throughout the history of the United States, the ability to be raised in a certain religion was considered to be a privilege.[147] Although privilege did not amount to right, the courts went overboard to ensure that this "privilege" was satisfied. In *Pereira v. Pereira*,[148] a Massachusetts court said: "I find that no one, not even the parents, have the right to deny an immature child who has been baptized a Roman Catholic, the privilege of being reared in Catholicity."[149] Although it seems that the court is recognizing and protecting a right of the child, what the courts were actually doing during this time period was protecting the religion. This results in the subordination of the individual to the religion. For example, in *In re Mancini*,[150] an adult brother petitioned for the custody of his fourteen-year-old sister, who was currently living with a Protestant minister. The brother was Catholic. The sister opposed the petition, and the judge held that although he did not wish to disregard the child's wishes, "I will not forget that the religious *status* of the child before me is that of a Catholic child."[151]

Later, some courts began to consider that the child may have a right to affect its religious upbringing. A New York court held it was an error to place Catholic children for adoption in a Jewish social agency where an authorized Catholic agency was willing to assume custody for the children:

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147. In fact, the First Amendment to the Constitution, which provides protection for religious freedoms, was adopted during an "era of extreme religious bigotry and persecution." Zummo v. Zummo, 574 A.2d 1130, 1133 (Pa. Super. Ct. 1990). For a discussion of the founding of protection of religious liberties, see *Zummo*, 574 A.2d at 1333. Although the nation was born in bigotry, the Court has recognized that today the Constitution is interpreted to protect "the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism." Wallace v. Jaffree, 472 U.S. 38, 52 (1985) (footnote omitted).

148. No. D-16741 (Probate Court, Bristol County, Mass. 1954).

149. *Id.*

150. 151 N.Y.S. 387 (1915).

151. *Id.* at 388 (emphasis added).

> It was and still is practicable to give these infants to an institution under the control of persons of their religious faith in fulfillment of the statute that their "religious faith shall be preserved and protected by the Court." To this the children have a natural and legal right of which they cannot be deprived by their temporary exposure to the culture of another religion prior to the age of reason.[152]

Until the 1980s, however, it was doubtful whether a child actually had a legal right to affect his or her own religious upbringing.[153]

Although the Supreme Court has not yet conclusively decided that children retain the right to affect their own religious upbringing, several recent cases at least allude to some protection. For example, in *Westside Community Schools v. Mergens*, the Court upheld the right of high school students to form a "Christian Club" that utilized school facilities.[154] *Mergens* was based upon an alleged violation of the Equal Access Act,[155] which provides that schools may not deny organizations equal access to their facilities on the basis of religion.[156] The issue, as framed by the Court, was one of statutory construction, and whether the student group fit within the statute's concept of a protected organization. The Court clearly did not hold that children have a protected constitutional right to free exercise of religion. Nevertheless, *Mergens* indicates that it is understood

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152. *In re* Santos, 105 N.Y.S.2d 716, *appeal dismissed*, 304 N.Y. 483 (1952).

153. Pfeffer, *supra* note 145, at 339. "When [the court] speaks of the child's 'privilege' or 'natural right' to its religious faith or states that the child is 'entitled to be raised' in a particular faith, it is using theological terminology and entering into the field of theology or, more realistically, misdesignating the child as beneficiary of legal protection being accorded either to its parent or to the particular church." *Id.* (footnote omitted).

This was also mentioned by Justice Douglas in his dissent in *Wisconsin v. Yoder*, where he criticized the majority for considering the child's right to free exercise as being derived from the parents' right. Wisconsin v. Yoder, 406 U.S. 205, 243 (1972) (Douglas, J., dissenting).

154. 496 U.S. 226 (1990). Significantly, the Court was not required to address the free exercise issue. The action was based upon the Equal Access Act, 20 U.S.C. §§ 4071-4074 (1988), and therefore the Court simply based its decision upon that Act. The Court did engage in a lengthy discussion of the establishment clause conflict.

155. 20 U.S.C. §§ 4071-4074 (1988).

156. 20 U.S.C. § 4071(a). The Act applies to public secondary schools receiving federal funding and having a "limited open forum." *Id.*

by the Court and by the legislature that children do hold religious beliefs, and these beliefs are worthy of *some* consideration.

Despite granting that these beliefs are worthy of some protection, the Court has avoided stating that these beliefs are worthy of *constitutional* protection. For example, in *Committee for Public Education v. Nyquist*,[157] the Court was faced with a challenge to the state of New York's policy of granting public funds for the "maintenance" of private schools and tuition reimbursement programs for parents who sent their children to those schools. The policy was challenged on Establishment Clause grounds, and one of the defenses of the state was that the policy was necessary to protect the right to free exercise.[158] The state argued that parents had a constitutional right to have their children educated in sectarian schools. The state did not argue, nor did the Court mention, however, that the children themselves had a right to freely exercise their religion, and that such a right might include the availability of religious education.[159]

Perhaps the greatest recognition of a child's right to free exercise is found in yet another Establishment Clause case, *Wisconsin v. Yoder*.[160] In this famous case involving the right of the Amish to decline to send their children to public high schools, Justice Douglas penned a dissent that criticized the Court for considering only what the Amish *parents* wanted, and failing to consider what the Amish *children* might want.[161] The majority found that the right of the Amish children to religious freedom was not presented. Douglas took issue with this, stating that "[a]lthough the lower courts and a majority of this Court assume an identity of interest between parent and child, it is clear that they have treated the religious interest of the child as a factor in the analysis."[162] Douglas believed that

157. 413 U.S. 756 (1973).

158. *Id.* at 788.

159. *See* Pfeffer, *supra* note 145, at 338-39; *infra* text accompanying note 162.

160. 406 U.S. 205 (1972).

161. *Id.* at 241 (Douglas, J., dissenting). This distinction is important because it recognizes the child's right as independent of, rather than derived from, the right of the parent.

162. *Yoder*, 406 U.S. at 242.

religion was an individual issue, and that the appeal presented the issue of "children's religious liberty."[163]

Justice Douglas reviewed previous cases involving protected constitutional rights of children such as *Haley v. Ohio*,[164] *In re Gault*,[165] *In re Winship*,[166] *Tinker v. Des Moines Independent Community School District*,[167] and *West Virginia State Board of Education v. Barnette*.[168] He concluded from these cases that "children themselves have constitutionally protectible interests" as they are "'persons' within the meaning of the Bill of Rights."[169] The majority avoided a discussion of this issue by holding that it was not before them.

As Justice Douglas noted, the Supreme Court on several occasions has held children to be "persons" entitled to the protections of the Bill of Rights. For example, in the case of *Haley v. Ohio*,[170] the Court held that the protections of the Fourteenth Amendment were available to a fifteen-year-old. A similar result was reached in *In re Gault*.[171] There, the Court stated "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[172] The protection of the Sixth Amendment was subsequently held to cover a twelve-year-old in *In re Winship*.[173] *Haley*, *Gault*, and *Winship* provided procedural protections to children. But the application of the Bill of Rights to children by the Supreme Court has not been limited solely to procedural protections. These cases developed from earlier cases such as *Pierce v. Society of Sisters*[174] and *Prince v. Massachusetts*,[175] which dealt with constitutionally protected parental rights that were substantive, rather than procedural.

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163. *Id.* at 243.
164. 332 U.S. 596 (1948).
165. 387 U.S. 1 (1967).
166. 397 U.S. 358 (1970).
167. 393 U.S. 503 (1969).
168. 319 U.S. 624 (1943).
169. *Yoder*, 406 U.S at 243.
170. 332 U.S. 596 (1948).
171. 387 U.S. 1 (1967).
172. *Id.* at 13.
173. 397 U.S. 358 (1970).
174. 268 U.S. 510 (1925) (recognizing the right of the child to a religious education).
175. 321 U.S. 158 (1944).

In *Tinker v. Des Moines Independent Community School District*,[176] the Court found that students between the ages of thirteen and sixteen had First Amendment rights, and that those rights had been impinged when they were disciplined for wearing armbands in school. The Court stated: "Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State."[177] Here the Court explicitly expands the scope of protection from procedural, to substantive free speech rights. In doing so, the Court very plainly states that children are "persons" entitled to the protections of the Constitution.

Finally, in *West Virginia State Board of Education v. Barnette*,[178] the Court implied that children have a protected right to free exercise of religion under the Constitution. In *Barnette*, students and their parents claimed that a school rule requiring the students to salute the American flag violated their religious beliefs. The Court agreed, and stated: "we are dealing with a compulsion of students to declare a belief."[179] However, the Court did not say that children have a right to free exercise. In fact, it is possible that the Court was holding that the rights of the parents had been violated, and the children held those rights derivatively.[180] Justice Douglas, in his *Yoder* dissent, however, did not think so. He stated: "While the sanction included expulsion of the students and prosecution

176. 393 U.S. 503 (1969).

177. *Id.* at 511.

178. 319 U.S. 624 (1943).

179. *Id.* at 631.

180. In a later case, *Prince v. Massachusetts*, 321 U.S. 158 (1944), the Court initially seemed to give credence to the conclusion that *Barnette* had held that children hold a protected right to exercise their religion. The Court said in *Prince*: "The rights of children to [freely] exercise their religion . . . have had recognition here, most recently in *West Virginia State Board of Education v. Barnette*." *Id.* at 165 (citation omitted). But the Court later hedged on this saying, "[i]t is true children have rights, in common with older people, . . . " (*Id.* at 169), but "[t]he state's authority over children's activities is broader than over like actions of adults." *Id.* at 168. Thus, what *Prince* may be trying to say is that constitutional protection exists for a child's free exercise of religion, but not to the same degree as for adults. The difficulty is that the Court never articulates how the child's right is to be measured, whether it be by the "strict scrutiny" or "compelling interest" test, or some other lower standard.

of the parents, the vice of the regime was its interference with *the child's free exercise of religion.*"[181]

Regardless of whether the Court in 1943 intended to hold that children have a constitutionally protected right to freely exercise their religion, or whether the Court felt that right was derived from the parent's right, the Court has since held that children themselves are entitled to the protection of the Bill of Rights. If the provisions of the Free Speech Clause of the First Amendment, the Sixth Amendment, and the Fourteenth Amendment all apply to protect children, then the Free Exercise Clause of the First Amendment should provide similar preservation.

A child's placement in a foster home should not affect his or her constitutionally protected religious upbringing.[182] The difficulty lies in deciding at what point the child's interest actually becomes a protected right.[183] In *In re Glavas*,[184] the court questioned whether a child under the age of seven could competently declare a religious affiliation. The child did not hold a protectable right until "he, himself, is in the position to determine what religion he desires to follow providing, always, that ethical concepts and life in response to such concepts are inculcated and instilled in the child."[185]

In *In re Santos*, on the other hand, when placing two sisters, aged seven and eight, the court took into consideration "the religion of the girls themselves as evidenced by the finding of their Jewishness, to be weighed in any estimate of the psycho-

181. Wisconsin v. Yoder, 406 U.S. 205, 244 (1972) (Douglas, J., dissenting) (emphasis added) (citation omitted).

182. *See* Arneth v. Gross, 699 F. Supp. 450 (S.D.N.Y. 1988) (holding that minors residing under foster care in a Roman Catholic mission fall outside of the mission's religious activity, and the minors have a right to use contraception privately even though the use of birth control violates church doctrine).

183. *See* Paul Ramsey, *The Legal Imputation of Religion To An Infant in Adoption Proceedings*, 34 N.Y.U. L. REV. 649 (1959). "Any finding as to 'the faith of a child,' which is not entirely derived from parental choice of religion, must be based on considerations of the child's capacity and awareness, since the court may not without using its own unrealized prejudices know what reality or truth there may be in the asserted objective transmission of religion to a child by other means." *Id.* at 664.

184. 121 N.Y.S.2d 12 (1953).

185. *Id.* at 13-14.

logical and other factors in their best interests. [A]nd, possibly, a finding as to the girls' subjective allegiances."[186] But to what extent can a child hold a "subjective allegiance?"[187] And how would a court determine when such an allegiance was present?

In the *Zummo* case, the trial court determined that three, four, and eight year old children had asserted personal religious affiliations that were entitled to protection.[188] This was reversed on appeal.[189] The Pennsylvania Superior Court found that:

> Though no uniform age of discretion is set, children twelve or older are generally considered mature enough to assert a religious identity, while children eight and under are not. With those ranges as a starting point, judges exercise broad discretion on a case by case basis in determining whether a child has sufficient capacity to assert for itself a personal religious identity.[190]

The court also noted that in *Zucco v. Garrett*, an Illinois Appeals Court held that unless there is some evidence of a child's personal preferences, the question of sufficient maturity does

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186. Ramsey, *supra* note 183, at 672 (discussing *In re Santos*, 105 N.Y.S.2d 716 (1951), *appeal dismissed*, 109 N.E.2d 71 (1952)); *see* Zummo v. Zummo 574 A.2d 1130, 1148-50 (Pa. Super. Ct. 1990).

187. *See* Harold S. Kushner, WHEN CHILDREN ASK ABOUT GOD 25-35 (1971); Raymond G. Carey, *Influences of Peers in Shaping Religious Behavior*, 10 J. FOR THE SCI. STUDY OF RELIGION 157 (1971); Cynthia A. Clark et al., *The Transmission of Religious Beliefs and Practices from Parents to Firstborn Early Adolescent Sons*, 50 J. OF MARRIAGE & THE FAM. 463 (1988); Marie Cornwall, *The Social Bases of Religion: A Study of Factors Influencing Religious Belief and Commitment*, 29 REV. OF RELIGIOUS RES. 44, 50 (1987); Roger L. Dudley & Margaret G. Dudley, *Transmission of Religious Values from Parents to Adolescents*, 28 REV. OF RELIGIOUS RES. 3 (1986); Dean R. Hoge et al., *Transmission of Religious and Social Values from Parents to Teenage Children*, 44 J. OF MARRIAGE & THE FAM. 569 (1982); Bruce Hunsberger, *Parent-University Student Agreement on Religious and Nonreligious Issues*, 24 J. FOR THE SCI. STUDY OF RELIGION 314 (1985); Dianne K. Kieren & Brenda Munro, *Following the Leaders: Parents' Influence on Adolescent Religious Activity*, 26 J. FOR THE SCI. STUDY OF RELIGION 249 (1987); Ian McAllister, *Religious Change and Secularization: The Transmission of Religious Values in Australia*, 49 SOC. ANALYSIS 249 (1988); Raymond H. Potvin & Che-Fu Lee, *Adolescent Religion: A Developmental Approach*, 43 SOC. ANALYSIS 131 (1982).

188. *Zummo*, 574 A.2d at 1148.

189. *Id.* at 1149-50.

190. *Id.* at 1149.

not arise.[191] In *Zummo*, the children had expressed no rights, and therefore the court felt that it did not need to decide the issue.[192]

Nevertheless, the court's observation about judicial determinations of a child's religion was reasonable. Without trying to squeeze such determinations into a rigid and mechanical test, the court set forth age guidelines for judges to use as a starting point. From there the judge may apply the facts and circumstances of the case in front of him or her, and determine whether the child is sufficiently mature to have an interest in determining his or her own religion that is protected by the First Amendment. Furthermore, the judge may decide, when necessary, whether the child's belief and affiliation are sufficiently developed to override the preference of a parent. The requisite standard to be applied when the right is sought to be encroached upon by the state will be considered later in this article.[193]

B. *The Parents' Right to Direct the Child's Religious Upbringing*

In any situation where the custody of a child changes, whether it be a divorce proceeding, adoption, or foster care, two individuals or sets of parents are involved. The parties include the relinquishing (usually natural) parent or parents, and the assuming (usually adoptive or foster) parent or parents. Each side of the transaction possesses valuable free exercise rights that may be impacted by the State.[194]

1. Relinquishing or Natural Parents

It is undisputed that parents have a constitutional right to direct the religious education and upbringing of their

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191. *Id.* (citing Zucco v. Garrett, 501 N.E.2d 875, 880 (Ill. App. Ct. 1986)).

192. *Id.* at 1149-50.

193. *See infra* notes 233-302 and accompanying text.

194. *See generally* JOSEPH R. CARRIERI, *Rights of Natural Parents, in* THE FOSTER CHILD 1989: FROM ABANDONMENT TO ADOPTION 185 (PLI Litig. & Admin. Practice Course Handbook Series No. 151, 1989).

children.[195] In a case immediately preceding the *Smith* decision, the Superior Court of Pennsylvania noted that "[t]he United States Supreme Court has specifically held that parental authority in matters of religious upbringing may be encroached upon, only upon a showing of a 'substantial threat' of 'physical or mental harm to the child, or to the public safety, peace, order, or welfare.'"[196]

This holding arose from decisions such as *Prince v. Massachusetts*[197] and *Pierce v. Society of Sisters*,[198] which held that parents had protected First Amendment rights to affect the religious development of their children. In *Prince*, a Jehovah's Witness was convicted of a violation of child labor laws for allowing her nine-year-old daughter to proselytize. The mother appealed, claiming that the law prevented her from freely exercising her religion by preventing her from passing her faith on to her niece.[199] The Court recognized the right of the parent to affect the child's religious upbringing, citing *Pierce* and *Meyer v. Nebraska*.[200] Nevertheless, it found that the State's interest in protecting children was sufficient to outweigh the parental right, and upheld the statute.[201]

Pierce and *Meyer* firmly established the right of parents to direct their children's religious development. *Meyer* was the earlier of the two, and set up the basic foundation for *Pierce*—that parents and guardians have a protected liberty interest in directing the upbringing and education of the children under their control.[202] In *Meyer*, the United States Supreme Court considered a Nebraska statute that prevented teaching German in public schools. The Court found that

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195. Wisconsin v. Yoder, 406 U.S. 205, 230 (1972) (holding that parents' direction of religious upbringing may only be encroached upon by a showing of substantial threat to the "physical or mental health of the child or to the public safety, peace, order or welfare"); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

196. Zummo v. Zummo, 574 A.2d 1130, 1138 (Pa. Super. Ct. 1990) (quoting Wisconsin v. Yoder, 406 U.S. 205, 230 (1972)).

197. 321 U.S. 158 (1944).

198. 268 U.S. 510 (1925).

199. In addition to being the legal guardian of her niece, Mrs. Prince had two minor sons. Her sons engaged in proselytization as well. *Prince*, 321 U.S. at 161.

200. 262 U.S. 390 (1923).

201. *Prince*, 321 U.S. at 169-70.

202. *See Meyer*, 262 U.S. at 390.

Nebraska's statute unconstitutionally compromised the parents' liberty.[203]

Although *Meyer* initially promulgated the notion that parents have a protected interest in directing the upbringing of their children, *Pierce* "stands as a charter of the rights of parents to direct the religious upbringing of their children."[204] The plaintiffs in *Pierce* challenged an Oregon statute that required children to attend public school. The Court found the statute unconstitutional, writing:

> Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes a general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[205]

As a result of the *Meyer* and *Pierce* line of cases, "[t]his primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[206]

The right to direct the spiritual and religious development of the child does not disappear simply because a parent releases custody of the child.[207] In *Santosky v. Kramer*, the Court held

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203. *Id.* at 403.

204. State v. Whisner, 351 N.E.2d 750, 770 (Ohio 1976) (quoting Wisconsin v. Yoder, 406 U.S. 205, 233 (1972)).

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

206. *Whisner*, 351 N.E.2d at 769 (quoting Wisconsin v. Yoder, 406 U.S. 205, 232 (1972)).

207. "The vast majority of courts addressing this issue . . . have concluded that each parent must be free to provide religious exposure and instruction, as that parent

that "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents."[208] On the other hand, the natural parents' rights are not absolute.[209] For example, many cases have held that a parent may not deny a child necessary medical treatment on religious grounds.[210] Similarly, a state cannot be "expected to duplicate the standard of religious practice in the parents' home or satisfy the parents' every request with respect to the children's religious instruction."[211] Nevertheless, an attempt should be made to accommodate a parent's reasonable religious preferences in a foster care placement.[212]

2. Prospective Foster Parents

In addition to the rights of the natural parents, prospective foster care parents have free exercise rights that are impacted

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sees fit, during any and all period of legal custody . . . unless the challenged beliefs or conduct of the parent are demonstrated to present a substantial threat of present or future, physical or emotional harm to the child in absence of the proposed restriction." Zummo v. Zummo, 574 A.2d 1130, 1154-55 (Pa. Super. Ct. 1990).

A parent voluntarily placing a child into a foster home does not relinquish "legal" custody. MARK HARDIN, *Setting Limits on Voluntary Foster Care, in* FOSTER CHILDREN IN THE COURTS (Mark Hardin ed., 1983); JOSEPH R. CARRIERI, *The Ways The Foster Child Comes Into Foster Care, in* THE FOSTER CHILD 1989: FROM ABANDONMENT TO ADOPTION (PLI Litig. & Admin. Practice Course Handbook Series No. 151, 1989). *But see* Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 427 n.22 (1983).

208. 455 U.S. 745, 753 (1982); *see also* Stanley v. Illinois, 405 U.S. 645, 651-52 (1972); Jordan C. Paul, *"You Get the House. I get the Car. You Get the Kids. I Get Their Souls." The Impact of Spiritual Custody Awards on the Free Exercise Rights of Parents*, 138 U. PA. L. REV. 583 (1989).

209. Wisconsin v. Yoder, 406 U.S. 205, 233-34 (1972); *see also* Prince v. Massachusetts, 321 U.S. 158, 165-67 (1944); Duro v. District Attorney, 712 F.2d 96, 99 (4th Cir. 1983) (holding state's interest in compulsory education limited parental rights).

210. Hermanson v. State, 570 So.2d 322 (Fla. Dist. Ct. App. 1990); *see* Jehovah's Witnesses v. King County Hosp., 278 F. Supp. 488, 504 (W.D. Wash. 1967) (three judge panel), *aff'd*, 390 U.S. 598 (1968) (per curiam); *see also* Paula A. Monopoli, *Allocating the Costs of Parental Free Exercise: Striking A New Balance Between Sincere Religious Belief and a Child's Right to Medical Treatment*, 18 PEPP. L. REV. 319 (1991).

211. Pfoltzer v. County of Fairfax, 775 F. Supp. 874, 885 (E.D. Va. 1991) (citing Wilder v. Bernstein, 848 F.2d 1338 (2d Cir. 1988)).

212. *See id.* (quoting *Wilder*, 848 F.2d at 1346-47).

by the system. In *Orzechowski v. Perales*,[213] the Roman Catholic Orzechowskis attempted to assume custody of a Jewish child who was physically handicapped.[214] Although the placement agency, the Foundling Hospital, found the Orzechowskis to be "caring, concerned individuals who are ready to provide a loving home for a child," they denied the application based upon the Orzechowskis' religion.[215] The hospital had found in the Orzechowskis a loving and caring couple who were qualified to take care of a disabled child who had spent her entire life in a hospital. However, the hospital denied them the opportunity to adopt the child, notwithstanding the Orzechowskis' plans to raise the child in the Jewish faith with the help of a rabbi.

The Orzechowskis sued, claiming, among other things, that their right to free exercise was being infringed. They argued that the application of religious matching provisions inhibited the free exercise of their religion because they were told they could not "continue to practice their religion and adopt a child whose biological parents were Jewish."[216] The New York County Supreme Court stated that an infringement upon free exercise must be "substantial" before it is actionable.[217] The court found that "[i]t cannot be said that there is substantial pressure on the Orzechowskis to modify their religious beliefs."[218] As a result, their free exercise claim was dismissed.[219]

The *Orzechowski* case is important for two reasons. First, it indicates that although potential adoptive parents (and foster parents) have a free exercise right to adopt children of a different faith, that right is subordinate to the wishes of the natural parent. Second, the case indicates the extremes to which some

213. 582 N.Y.S.2d 341 (1992).

214. The little girl, Nelli, was four years old and suffered congenital disabilities including club feet, dislocated hips and a missing leg socket. She also suffered from Goltz Syndrome, a condition causing fatty lesions on the face and body. Nelli was also afflicted with spina bifida and required daily catheterizations. *Id.* at 343.

215. *Id.* at 344 (quoting Plaintiff's Complaint at paragraph 40).

216. *Id.* at 348 (quoting Plaintiff's Opposition Brief at 24).

217. *Id.* (citing Thomas v. Review Board of Indiana Employment Div., 450 U.S. 707, 717-18 (1981)).

218. *Id.*

219. *Id.*

courts will go to fulfill the desires of the natural parents with regard to the religious upbringing of the child. *Orzechowski* can be criticized on this second point, as the overriding concern should be the best interest of the child. In the *Orzechowski* case, there can hardly be doubt that the best interests of that child called for placement with the Orzechowskis, even though they were not Jewish. A reasonable attempt to locate a Jewish family had been made, and none were available. The family that was available had offered to raise the child in the Jewish faith with the assistance of a rabbi. The court's denial of placement gives too rigid a consideration of the natural parents' rights.

3. Conflicting Religious Beliefs Between Parents

One of the most perplexing problems facing courts making custody determinations is the resolution of conflicts between the natural mother's religious beliefs and the natural father's religious beliefs.[220] There are no cases discussing this issue in either a foster care or adoption setting, but it has been analyzed in a marital dissolution context.[221] This issue merits brief discussion, as it may foreseeably arise in foster care determinations if the relinquishing parents disagree about the religious preference for the assuming parents.

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220. The Supreme Court of North Dakota remarked that "[f]ew areas of dispute in child custody and visitation cases are more fraught with difficulty than those involving differences in the religious beliefs of the divorced parents." Hanson v. Hanson, 404 N.W.2d 460, 463 (N.D. 1987). The Washington Supreme Court noted that "intervention in matters of religion is a perilous adventure upon which the judiciary should be loath to embark." Munoz v. Munoz, 489 P.2d 1133, 1135 (Wash. 1971) (citing Donahue v. Donahue, 142 N.J. Eq. 701 (E. & A. 1948)); *see also* Wojnarowicz v. Wojnarowicz, 137 A.2d 618, 621 (N.J. Super. Ct. 1958); LeDoux v. LeDoux, 452 N.W.2d 1, 7 (Neb. 1990) (Shanahan, J., dissenting).

221. *See, e.g.*, Clift v. Clift, 346 So.2d 429, 435 (Ala. Civ. App. 1977); *In re* Marriage of Urband, 137 Cal. Rptr. 433 (Cal. Ct. App. 1977); Goodman v. Goodman, 141 N.W.2d 445, 448 (Neb. 1966); Commonwealth *ex rel.* Ackerman v. Ackerman, 205 A.2d 49, 51-52 (Pa. Super. 1964); *In re* Marriage of Hadeen, 619 P.2d 374, 382 (Wash. Ct. App. 1980); *see also* Jay Copp, *Program Helps Faith of Kids of Divorce*, THE NEW WORLD, July 19, 1991; Rosalie Duron, *We Don't Want To See You Anymore*, LIBERTY, Sept./Oct. 1991, at 16; Daniel J. Lehmann, *DePaul Tries New Tactics On Interfaith Divorce Woes*, CHI. SUN-TIMES, June 16, 1991, at 16; *Pilot Project Relates to Religious Child Custody*, UNITED CHURCH NEWS, Nov. 1991, at 16; Mitchell A. Tyner, *Who Gets the Kid?*, LIBERTY, May/June 1991, at 8.

In *Kirchner v. Caughey*,[222] the Court of Appeals of Maryland vacated an order entered by the lower court that prohibited a non-custodial father from taking his daughter, Bridgette, to church. The mother and father were divorced and practiced different religious faiths. At the time Bridgette was born, her mother was Lutheran and her father Catholic. Bridgette was baptized in the Catholic faith but attended Lutheran services as a child. After the divorce, the father left the Catholic church and converted to the Methodist religion. In 1989, the father once again changed churches, this time to become a fundamentalist Baptist.[223]

Bridgette's mother told the trial court that Bridgette began to show signs of anxiety in late 1989. Bridgette was returning home from visits with her father in tears and having trouble sleeping. She believed these problems stemmed from certain of the father's religious activities and the "ardor" with which he pursued his fundamentalist beliefs. She asked the father not to take Bridgette with him to church, but he refused. At that point, the mother filed a petition seeking to enjoin the father from taking Bridgette to church.[224] After two days of testimony, the specially appointed master concluded, "by compelling the minor child to participate in his religious practices the father is harming the child and that such harm is, in fact, detrimental to her well-being—and that it is not in the best interest of the child to participate in the father's religious practices."[225]

The father took exceptions to this order, which were denied. On appeal, the court stated, "courts that have considered custody or visitation disputes involving the religious practices of the parents have generally required a clear showing that a parent's religious practices have been or are likely to be harmful to the child before allowing judicial interference with those religious practices."[226] The Maryland Court of Appeals held that the

222. 606 A.2d 257 (Md. Ct. App. 1992).
223. *Id.* at 260.
224. *Id.* at 259.
225. *Id.* at 261.
226. *Id.* at 261-62 (citing *In re* Marriage of Murga, 163 Cal. Rptr. 79, 82 (Cal. Ct. App. 1980); Compton v. Gilmore, 560 P.2d 861, 863 (Idaho 1977); Osier v. Osier, 410

record below demonstrated only the mother's conclusions and speculations that the father's religious activity had harmed the child. This was insufficient, as the father's constitutional rights could not be limited by the mere "general testimony of a parent that the child is 'confused' or 'upset' by conflicting religious practices."[227]

The court recognized that there may be some value in letting the child see the different religious attitudes and beliefs and that diversity is a "sound stimulant for a child."[228] The court cautioned, however, that the child should not be harmed by such diversity. Thus, "careful attention is needed to resolve the delicate question of what is in the best interest of this child with respect to attendance at the father's church."[229] The court remanded the case to the trial court with instructions to consider the type and method of judicial intervention required.

Courts have been cautioned that when there is sufficient need to intervene, the action should be that "which intrudes least on the religious inclinations of either parent and is yet compatible with the health of the child."[230] Further, the remedy should be "narrowly tailor[ed] . . . so as to result in the least possible intrusion upon the constitutionally protected interests of the parent."[231]

If the relinquishing parents are of different faiths, foster care placement agencies should consider whether families are available of either faith. Of course, other factors will also play a role in any placement decision. Because religion will not be the

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A.2d 1027, 1030 (Me. 1980); Felton v. Felton, 418 N.E.2d 606, 607-08 (Mass. 1981); Pope v. Pope, 267 S.W.2d 340, 343 (Mo. Ct. App. 1954); LeDoux v. LeDoux, 452 N.W.2d 1, 5 (Neb. 1990); Khlasa v. Khlasa, 751 P.2d 715, 719-21 (N.M. Ct. App. 1988); Hanson v. Hanson, 404 N.W.2d 460, 463-64 (N.D. 1987); Zummo v. Zummo, 574 A.2d 1130, 1140-41 (Pa. Super. Ct. 1990); Robertson v. Robertson, 575 P.2d 1092, 1093 (Wash. Ct. App. 1978); Munoz v. Munoz, 489 P.2d 1133, 1135-36 (Wash. 1971); *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1338-40 (1980); Annotation, *Religion As A Factor In Child Custody and Visitation Cases*, 22 A.L.R.4th 971, 1020-28 (1983)).

227. *Kirchner*, 606 A.2d at 262 (citing *Khlasa*, 751 P.2d at 720); *accord Felton*, 418 N.E.2d at 610; *Hanson*, 404 N.W.2d at 464; *Robertson*, 575 P.2d at 1093.

228. *Kirchner*, 606 A.2d at 263.

229. *Id.*

230. *Felton*, 418 N.E.2d at 608.

231. *LeDoux v. LeDoux*, 452 N.W.2d 1, 5 (Neb. 1990).

foremost consideration, the likelihood of a conflict is reduced. For example, where there is a Catholic father and a Jewish mother and only a Catholic home is available, the child should probably be placed in the Catholic home. In that situation, the foremost consideration is getting the child out of the custody of the state and into a family environment. Religion is a secondary consideration, but it is still a factor. It is preferable to place the child in an available Catholic home, as opposed to an available Baptist home.

The most difficult situation for a court will be where two homes of equal value are available; that is, the father is Catholic and the mother is Jewish, and both Catholic and Jewish homes are available. In making placement decisions in such a case, agencies would be wise to seek some type of mediation program to resolve the problem.[232]

C. *The State's Interests*

So far this article has considered the interests of three separate parties: the foster child, the natural parents, and the foster parents. There is yet another party with an interest in this puzzle, however. Most foster care and adoption programs are either managed by, or at least funded by, some state agency.[233] Thus, the state has an interest in how and where foster care children are placed.

Perhaps more importantly, the state has an interest in protecting the welfare of its minor citizens.[234] This interest is of-

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232. *See* Jay Copp, *Program Helps Faith of Kids of Divorce*, THE NEW WORLD, July 19, 1991; Daniel J. Lehmann, *DePaul Tries New Tactics On Interfaith Divorce Woes*, CHI. SUN-TIMES, June 16, 1991, at 16; *Pilot Project Relates to Religious Child Custody*, UNITED CHURCH NEWS, Nov. 1991, at 16.

233. *See* 2 HOMER H. CLARK JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 21.8, at 648 (2d ed. 1987).

234. *See* New York Foundling Hosp. v. Gatti, 203 U.S. 429, 439-40 (1906); *see also* Schall v. Martin, 467 U.S. 253, 263 (1984) (state's interest as *parens patriae* makes a juvenile criminal proceeding different from that of an adult); Santosky v. Kramer, 455 U.S. 745, 766-67 (1982) (state's interest as *parens patriae* is in preserving and promoting the welfare of the child); *In re* Heather B., 11 Cal. Rptr. 2d 891, 901 (Cal. Ct. App. 1992) (citing *Santosky*, 455 U.S. at 766-67); *In re* Eugene W., 105 Cal. Rptr. 736, 740 (Cal. Ct. App. 1972) (state as *parens patriae* has a duty to act in the best interest of the child); *In re* Alexander V., 613 A.2d 780, 785 (Conn. 1992) (state as

ten referred to as "*parens patriae*."[235]

The state's duty as *parens patriae* arose in ancient civilizations such as Greece, Egypt, and Persia.[236] The Greek state took charge of the children in its society and educated them according to the will of the state.[237] Conversely, under early English common law, the parent was given absolute control of the child, subject to the power of the king, in the interest of the child as well as in the interest of the state.[238] Justice Field wrote in *Insurance Co. v. Bangs*[239] that the doctrine of *parens patriae* arose as a right and duty of the English Crown, and that this right was delegated to the court of chancery.[240] This delegation of the "right of the Crown" is now assumed more frequently by state courts than by federal courts, and therefore it is the individual state that is "in the situation of *parens patriae*."[241]

> Unlike the police power, the State *parens patriae* power literally meaning "parent of the country," is a limited power of the State to act as guardian to persons with legal disabilities, such as infants and mental incompetents who lack the capacity to protect their own best interests. The modern concept of *parens patriae* is subject to three limitations.

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parens patriae is interested in accurate and speedy resolution of litigation).

235. *Parens patriae* literally means the father or parent of the country. *In re* Female S., 444 N.Y.S.2d 829, 831 (N.Y. Fam. Ct. 1981). Black's Law Dictionary defines "*parens patriae*" as "the principle that the state must care for those who cannot take care of themselves . . . . " BLACK'S LAW DICTIONARY 1114 (6th ed. 1991).

236. *See* Lippincott v. Lippincott, 97 N.J. Eq. 517, 519 (E. & A. 1925). For other detailed discussions of the history of the development of the concept of *parens patriae*, see *Weber v. Doust*, 146 P. 623 (Wash. 1915) and *In re Hudson*, 126 P.2d 765 (Wash. 1942).

237. *In re* Baby "M," 525 A.2d 1128, 1133 (N.J. Super. Ct. 1987).

238. *Lippincott*, 97 N.J. Eq. at 520.

239. 103 U.S. 435 (1881).

240. *Id.* at 438. There is some debate over whether the power and duty of *parens patriae* is held by the legislature or the courts. *See* Franklin v. New Jersey Dep't of Human Services, 543 A.2d 56, 69 n.13 (N.J. Super. Ct. App. Div. 1988) ("[A]ccording to our system of government, the power of *parens patriae* belongs exclusively to the legislature of each state, and is not possessed by the courts.") (quoting 4 POMEROY'S EQUITY JURISPRUDENCE § 1304, at 870 n.14 (5th ed. 1941)). As a matter of fact, however, both courts and legislatures claim the duty to act as *parens patriae*. *See, e.g.*, MD. CODE ANN., FAM. LAW § 5-502 (1992); *In re* Baby "M," 525 A.2d 1128, 1132 (N.J. Super. Ct. 1987).

241. *Bangs*, 103 U.S. at 438.

> First, exercise of *parens patriae* power is presumed to apply only to those "dependent" children who lack the mental competence of adults. Second, before the State acts, the federal due process clause requires the State to demonstrate that, by clear and convincing evidence, exercise of its power is necessary because the child's parent or custodian is unfit. Third and finally, State exercise of this power must attempt to further the best interest of the child.[242]

The doctrine of *parens patriae* requires the state to consider the child's best interests as paramount.[243] However, the breadth of this doctrine is debatable.[244] On the one hand, the state's duty as *parens patriae* may be said to protect children from "injury and injustice, from harmful employment and environment, and from abuse in all forms."[245] This definition could be construed fairly liberally. "[T]he legislature may and should make reasonable regulations tending toward the protection and welfare of the child; and so important is this governmental function that the limitations of the Constitution are to be so construed, if possible, as not to interfere with its legitimate exercise."[246] The state's power is not, however, unlimited.

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242. *In re* Thompson, 502 N.E.2d 916, 921 n.2 (Ind. Ct. App. 1986) (citing *Developments in the Law, The Constitution, and the Family*, 93 HARV. L. REV. 1156, 1201 (1980); See Douglas R. Rendleman, *Parens Patriae: From Chancery to Juvenile Court*, 23 S.C. L. REV. 205, 219 (1971); Gilbert T. Venable, Note, *The Parens Patriae Theory and Its Effect on the Constitutional Limits of Juvenile Court Powers*, 27 U. PITT. L. REV. 894, 905 (1966)).

243. *In re* Cooper, 631 P.2d 632, 637 (Kan. 1981) (citations omitted); *see also In re* Female S., 444 N.Y.S.2d 829, 831 (N.Y. Fam. Ct. 1981) ("Overlapping the court's role as *parens patriae* is the key principle of 'best interests of the child.'"). It has been suggested that *parens patriae* "contemplates not only a right, but also a duty, on the part of the State, to act for the protection of the individual and then only in his or her best interests." Brian J. Linn & Lesly A. Bowers, *The Historical Fallacies Behind Legal Prohibitions of Marriages Involving Mentally Retarded Persons—The Eternal Child Grows Up*, 13 GONZAGA L. REV. 625, 638 (1978).

244. The doctrine has been criticized, but usually only when it operates to deny a minor the right to due process of law. *See, e.g., In re* Gault, 387 U.S. 1, 16 (1967) ("The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance."); West Virginia *ex rel.* Harris v. Calendine, 233 S.E.2d 318 (W. Va. 1977) (holding that *parens patriae* has been suspect from earliest times); *see also* Kleinfeld, *supra* note 146.

245. Kansas *ex rel.* O'Sullivan v. Heart Ministries, Inc., 607 P.2d 1102, 1109 (Kan. 1980).

246. 43 C.J.S. *Infants* § 5 (1978). *See* Rodarte v. Cox, 828 S.W.2d 65, 79 (Tex. Ct.

In *Brock v. District Court of County of Boulder*,[247] the Supreme Court of Colorado held that "[t]he exercise of *parens patriae* jurisdiction should be limited to those cases where there is substantial evidence of a grave emergency affecting the immediate welfare of the child."[248]

A Maryland court stated in *In re* Adoption No. 2428[249] that "[a]s *parens patriae*, the State's goal is to provide the child with a permanent home."[250] In *Cornhusker Christian Children's Home, Inc. v. Department of Social Services*,[251] a Nebraska court found that society also had a "paramount" interest in seeing that children are loved and cared for, including moral training and education.[252]

The issue thus comes down to whether the state's "*parens patriae*" interest supersedes the parental constitutional rights.[253] In *In re* William L.,[254] a Pennsylvania court found that although parental rights were to be accorded significant protection, the State, acting as *parens patriae*, could constitutionally subordinate the parental rights to protect the child's essential health and safety needs.

But does the state's power include the right to place a child in a foster care home that is of a faith inconsistent with the faith in which the natural parent wishes the child to be raised? Or for that matter, may the state place the child in a foster care home of a faith inconsistent with the child's own beliefs? The State may claim at least three distinct interests that justify the exercise of its *parens patriae* power to subordinate the interests of the parents, and, if the issue presents itself, those of the child.

App. 1991); *see also* 67A C.J.S. *Parent & Child* § 52 (1978); 42 AM. JUR. 2D *Infants* §§ 14, 15 (1969).

247. 620 P.2d 11 (Colo. 1980).

248. *Id.* at 14.

249. 567 A.2d 139 (Md. Ct. Spec. App. 1989).

250. *Id.* at 146; *see also In re* Enrique R., 494 N.Y.S.2d 800, 801 (N.Y. Fam. Ct. 1985) (recognizing that the state's goal is to provide permanent home).

251. 416 N.W.2d 551 (Neb. 1987).

252. *Id.* at 561.

253. *See, e.g., In re* Cross, Nos. 89-033, 89-034, 1991 Conn. Super. LEXIS 2350, at *10-11 (Conn. Super. Ct. Sept. 27, 1991).

254. 383 A.2d 1228 (Pa. 1978).

First, the child's best interests require placement in private homes as quickly as possible; considering the religious preferences of children and/or their parents will result in delays that are not in the child's best interest. Second, if religion is a factor in making placements, children of more popular faiths will be placed more rapidly and in "better" homes than foster care children of less popular faiths. Finally, the State may have a legitimate concern to avoid a conflict with the Establishment Clause. The following subsections consider these three state interests.

1. Quick Placement

In a typical foster care scheme, children who are abandoned or who are removed from the care and custody of their natural parents are placed into the care and custody of either a state or private institution.[255] The quality of the institutions varies.[256] They can range from being virtual dungeons—in which children are paid scant attention and are under minimal supervision, facing recurring disease, violence, and other abuse—to clean and bright accommodations where the children are well cared for and educated.[257] Regardless of where a particular institution falls on this scale, placing a child with a foster care family is better.[258] Child psychologists have argued that children need the stable environment of a family to properly develop, a need that goes unfulfilled while the child remains in the custody of the state. Thus, the quick placement of

255. *See* THEODORE J. STEIN, CHILD WELFARE AND THE LAW 18 (1991). Of the fifty states, the District of Columbia, Puerto Rico, the Virgin Islands, and Guam, 36 systems are state administered and 18 are state supervised. *Id.* at n.19 (citing U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CHARACTERISTICS OF STATE PLANS FOR AID TO FAMILIES WITH DEPENDENT CHILDREN 2 (1983)).

256. *See* Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children From Abuse and Neglect*, 23 HARV. C.R.-C.L. L. REV. 199 (1988).

257. Stacey L. Arthur, *The Norplant Prescription: Birth Control, Woman Control, or Crime Control?*, 40 UCLA L. REV. 1, 78 (1992) (citing Richard P. Barth & Marianne Berry, *Child Abuse and Child Welfare Services, in* CONDITIONS OF CHILDREN IN CALIFORNIA 227, 236-37 (1989)).

258. MARK HARDIN & ANN SHALLECK, COURT RULES TO ACHIEVE PERMANENCY FOR FOSTER CHILDREN: SAMPLE RULES AND COMMENTARY 10 (1985); Leon A. Rosenberg, *Psychological Factors in Separation and Reunification: The Needs of the Child and of the Family*, 12 CHILDREN'S LEGAL RTS. J. 19 (1991).

children into private homes is a significant factor in foster care placement.[259]

States may feel that consideration of religion will result in delay that is detrimental to the child, since consideration of religion will require time spent with the child, each natural parent, and each potential foster care parent to determine the compatibility of their faiths.

Religion, however, need not be an all-encompassing factor decisive in every placement. The children and parents have the right to have religion considered as one of several important factors.[260] In the end, quick placement may be in an individual child's best interest, regardless of the fact that the placement is not "in-religion." On the other hand, if two homes are simultaneously available for an Orthodox Jewish child, and one home is Orthodox Jewish and the other home is Catholic, why not take the child's religion into consideration and place the child in the Jewish home?

Quick placement may not be the greatest concern for some children. For example, a child who faces physical disabilities may require placement with a family that is equipped to deal with those disabilities.[261] Certainly a disabled child should not be placed with the very first family that becomes available simply because it is better for the child to be placed quickly rather than anything else.[262] However, if the state takes into consideration other factors that may cause delay, such as physical disability, age, gender, race,[263] and proximity to natural fami-

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259. *See* Jim Bencivenga, *Experts Assess Laws, Costs in Fight Against Child Abuse*, CHRISTIAN SCI. MONITOR, Sept. 29, 1983, at 3.

260. *See* Orzechowski v. Perales, 582 N.Y.S.2d 341, 347 (1992).

261. *See id.* at 343.

262. The converse of this is the denial of placement on the basis of parental preference, as in *Orzechowski*. *Id.* The "best interests" standard in *Orzechowski* should have led that court to deny the stated parental preference for a Jewish home.

263. The issue of whether a state may constitutionally consider a child's race as a factor in foster care placements has been widely discussed. *See, e.g.*, Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching In Adoption*, 139 U. PA. L. REV. 1163 (1991); James S. Bowen, *Cultural Convergences and Divergences: The Nexus Between Putative Afro-America Family Values and the Best Interests of the Child*, 26 J. FAM. L. 487 (1987-88); Angela T. McCormick, *Transracial Adoption: A Critical View of the Courts' Present Standards*, 28 J. FAM. L. 303 (1989-90).

ly, then the state is admitting that quick placement is not the overriding concern in every placement. Failure to consider religion under these circumstances is therefore inexcusable and unconstitutional.[264]

2. Avoiding Discrimination

A state may fail to consider a child's or parent's religious preferences to avoid discrimination.[265] If, for example, there are three Catholic homes for every Jewish home and ten Jewish homes for every Sikh home in any given community, and religion is considered as a factor in every placement, then Catholic children are far more likely than Sikh or Jewish children to (i) be placed quickly, and (ii) be placed in a home of a consistent faith. By considering religion as a factor in the placement process, children of Jewish and Sikh faiths are being deprived of the benefits accorded Catholic children solely on the basis of their religion. By refusing to consider religion as a factor in the placement process, the state avoids the potential for discrimination.

This problem can be avoided by using a placement system that allows the individual child or parent to have the option of eliminating the consideration of religion as a factor in the process. Therefore, if the child is Jewish and does not wish to potentially delay placement by waiting for a Jewish home, the child may choose to be placed on a first-come-first-served basis. This shifts the onus of the potential discriminatory effect arising from the disproportionate number of available non-Jewish homes from the state to the individual.

3. Avoiding Establishment Clause Conflict

An issue related to the additional time necessary to consider religion as a factor in foster care placements is the state's

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264. *See infra* notes 303-24 and accompanying text. If a statute (or state policy) contains a system of individualized exemptions, under *Smith*, the "compelling interest" test applies when the challenger can show a burden to the free exercise of religion. Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872, 883-84 (1990).

265. *See* Wilder v. Sugarman, 385 F. Supp. 1013 (S.D.N.Y. 1974).

concern about avoiding an Establishment Clause conflict.[266] States may be concerned about whether they are advancing religion or becoming excessively entangled with religion if they consider religion as a factor in the placement process.[267]

For many years, the United States Supreme Court has decided such issues by application of the three-part test articulated in *Lemon v. Kurtzman*.[268] To be constitutional, a statute or practice must meet the following requirements: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.'"[269] This test has been applied consistently over the years, but with inconsistent results.[270]

> Thus, as of today, it is constitutional for a state to hire a Presbyterian minister to lead the legislature in daily prayer,[271] but unconstitutional for a state to set aside a moment of silence in the schools for children to pray if they want to.[272] It is unconstitutional for a state to require employers to accommodate their employees' work schedules to their sabbath observances,[273] but constitutionally mandatory for a state to require employers to pay workers compensation when the resulting inconsistency between work and sabbath leads to discharge.[274] It is constitutional for the government to give money to religiously affiliated organizations to teach adolescents about proper sexual

266. The Establishment Clause provides: "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. The Establishment Clause was made applicable to the states in *Everson v. Board of Education*, 330 U.S. 1 (1947). For a criticism of incorporation, see William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191 (1990).

267. *See* Wilder v. Bernstein, 645 F. Supp. 1292, 1332 (S.D.N.Y. 1986).

268. 403 U.S. 602 (1971).

269. *Id.* at 612-13 (citations omitted).

270. *See generally* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (1986).

271. Marsh v. Chambers, 463 U.S. 783 (1983).

272. Wallace v. Jaffree, 472 U.S. 38 (1985).

273. Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).

274. Frazee v. Employment Sec. Dep't, 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Sherbert v. Verner, 374 U.S. 398 (1963).

> behavior,[275] but not to teach them science or history.[276] It is constitutional for the government to provide religious school pupils with books,[277] but not with maps;[278] with bus rides to religious schools,[279] but not from school to a museum on a field trip;[280] with cash to pay for state mandated standardized tests,[281] but not to pay for safety-related maintenance.[282] It is a mess.[283]

This "mess" has generated criticism of the test by members of the current Court.[284] The commentators have taken a similar view of *Lemon*.[285]

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275. Bowen v. Kendrick, 487 U.S. 589 (1988).

276. Lemon v. Kurtzman, 403 U.S. 602, 618-19 (1971).

277. Board of Educ. v. Allen, 392 U.S. 236, 238 (1968).

278. Wolman v. Walter, 433 U.S. 229, 249-51 (1977).

279. Everson v. Board of Educ., 330 U.S. 1, 17 (1947).

280. *Wolman*, 433 U.S. at 252-55.

281. Committee for Pub. Educ. v. Regan, 444 U.S. 646, 653-54 (1980).

282. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 774-80 (1973).

283. McConnell, *Crossroads*, *supra* note 2, at 119-20. As Professor McConnell has vividly illustrated, the Lemon test allowed the Warren and Burger Courts to reach just about any result they wished in any given case. *Id.* at 119.

284. Justice O'Connor has been most outspoken in this regard. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), she stated: "It has never been entirely clear . . . how the three parts of the [*Lemon*] test relate to the principles enshrined in the Establishment Clause." *Id.* at 688-89 (O'Connor, J., concurring); *see also* Aguilar v. Felton, 473 U.S. 402, 429-30 (1985) (O'Connor, J., dissenting) (expressing "doubts about the entanglement test").

The majority in *Lynch* found a nativity scene in a public location constitutionally acceptable because the display also included candy-striped poles, a Christmas tree, carolers, an elephant, a teddy bear, a clown, and a talking wishing well. Lawyers have dubbed the holding in *Lynch* "the three plastic animals rule." McConnell, *Crossroads*, *supra* note 2, at 127. In *County of Allegheny v. ACLU*, 492 U.S. 573, 617-18 (1989), the Court applied the "three plastic animals rule" to a forty-five foot tall Christmas tree. In that case, the county's display of a menorah was challenged, but was found constitutional because of the tree.

Other Justices have criticized the Lemon test as well. *See, e.g.*, *County of Allegheny*, 492 U.S. at 656 (Kennedy, J., concurring in part and dissenting in part) ("Substantial revision of our Establishment Clause doctrine may be in order . . . ."); Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) ("[P]essimistic evaluation . . . of the totality of Lemon is particularly applicable to the 'purpose' prong . . . ."); Wallace v. Jaffree, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting) (describing the Lemon test as "a constitutional theory [that] has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results"); Roemer v. Board of Pub. Works, 426 U.S. 736, 768 (1976) (White, J., concurring) ("I am no more reconciled now to *Lemon* than I was when it was decided . . . . The threefold test of *Lemon* imposes unnecessary, and . . . superfluous tests for establishing [an Establishment Clause violation].").

285. Professor McConnell states "[t]he much discussed 'tension' between the two

The Supreme Court recently had an opportunity to replace the Lemon test in *Lee v. Weisman*.[286] The *Weisman* case involved a challenge to a public high school's practice of having prayers offered at graduation ceremonies.[287] The Court found that the prayers were unconstitutional, but avoided replacing the Lemon test. Justice Kennedy, writing for the majority, stated that the graduation prayers failed to meet the "minimum— . . . [c]onstitution[al] guarantee[] that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"[288] Because the practice failed to satisfy the stricter "coercion" analysis, there was no reason to reevaluate the *Lemon* framework, thus *Lemon* continued unmolested.[289]

Although the Court in *Weisman* discussed the case in terms of coercion, and did not apply the Lemon test, *Lemon* was not discarded. On the other hand, the "substantial effort to avoid reliance on *Lemon* suggests that the Court may be willing to allow the coercion test to coexist with, or supplant entirely, the *Lemon* framework."[290] Accordingly, the article will analyze

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Religion Clauses largely arises from the Court's substitution of a misleading formula [the Lemon test] . . . and subsidiary, instrumental, values (especially the separation of church and state) in place of the central value of religious liberty." Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 1-2; *see also* Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 936-41 (1986); David E. Steinberg, *Alternatives to Entanglement*, 80 KY. L.J. 691, 691-92 (1992).

286. 112 S. Ct. 2649 (1992).

287. The prayers were given by a rabbi, who was instructed to give nonsectarian prayers. Weisman v. Lee, 728 F. Supp. 68, 69 (D.R.I. 1990).

288. *Weisman*, 112 S. Ct. at 2649 (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

289. *See id.* Justice Scalia referred to the majority opinion as a "lamentable decision" and a "jurisprudential disaster." *Id.* at 2685 (Scalia, J., dissenting). Scalia wrote that the most important question in Establishment Clause analysis was the role of history and tradition. Justice Scalia felt that because high school graduation prayers were a long-held and important tradition in this country, they should be held constitutional. *Id.* at 2679. He criticized the majority for creating a "boundless, and boundlessly manipulable, test of psychological coercion 5.3(b)(iii) . . . ." *Id.* Chief Justice Rehnquist and Justices White and Thomas joined Scalia's dissenting opinion.

Despite Justice Scalia's "lamentations," the Lemon test has survived *Weisman* and remains the measure of constitutionality for Establishment Clause issues as of this writing.

290. *The Supreme Court, 1991 Term; Leading Cases*, 106 HARV. L. REV. 163, 264

whether a state must consider religion as a factor in foster care placements under both the Lemon test and the "coercion" test.

i. Secular Legislative Purpose

A statute that requires states to consider religion as a factor in the placement process would fulfill the state's duty as *parens patriae* to do what is in the child's best interest.[291] Doing what is in the child's best interest is a secular purpose and may require placement in a foster home of compatible religious belief. Purists might argue that to do what is in the child's best *religious* interest is still a *religious* purpose; however, such an argument confuses purpose with effect. As Justice O'Connor has commented: "It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden."[292]

Nevertheless, it is not likely that a state will pass a statute that requires agencies to consider religion as a factor. It is more likely that a challenge will arise as to a practice or policy: either challenging the practice of considering religion, on Establishment Clause grounds, or the practice of not considering religion, on free exercise grounds. Thus, the first prong of the Lemon test is not likely to be a factor in a foster care context.

ii. Principal or Primary Effect

It has long been recognized that a state cannot avoid all contact with religion.[293] As a result, the Supreme Court has promulgated a policy of state "neutrality"[294] toward religion.[295] The state may feel that by considering religion in the

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(1992).

291. *See* Note, *The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interest Equation*, 82 MICH. L. REV. 1702 (1984).

292. Wallace v. Jaffree, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring).

293. Zorach v. Clauson, 343 U.S. 306, 312 (1952); *see also* LEVY, *supra* note 270, at 121-22; *cf.* Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 382 (1985); Lynch v. Donnelly, 465 U.S. 668, 673 (1983); Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).

294. *See supra* notes 52-65 and accompanying text.

295. *See, e.g., Ball*, 473 U.S. at 382; *Wallace*, 472 U.S. at 60; Committee for Pub.

placement process, the state would be advancing religion by causing children to feel that they should have a religion. Nevertheless, a state need not be concerned that it will be accused of "advancing" religion by merely allowing it to be considered as a factor in foster care placements.[296] Furthermore, the flip side of "advancing" religion is that by failing to consider religion, a state could just as easily be accused of "inhibiting religion."[297] As Professor McConnell has observed,

> [T]he effects prong fails to distinguish between advancing *religion* and advancing *religious freedom*. Any advancement of religious freedom is an advancement of religion—but not vice versa . . . . By failing to distinguish between these two forms of [b] "advancement," the effects prong of the Lemon test interferes with benign government actions to accommodate or facilitate free religious exercise.[298]

The consideration of religion as a factor in foster care placements is an advancement of religious freedom, which should be permissible under Establishment Clause analysis,[299] and not an advancement of religious dogma, which the Establishment Clause was designed to prevent.[300]

Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 792-93 (1973); Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970); School Dist. of Abington Township v. Schempp, 374 U.S. 203, 215 (1963); Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

296. It has been said that the Establishment Clause requires what the Free Exercise Clause forbids. *See* McConnell, *Crossroads*, *supra* note 2, at 118.

297. Indeed, that is the thesis of this article. This article has been written in a "free exercise" rather than an "establishment" framework. Nevertheless, it is arguable that by failing to consider religion when placing foster children, the state inhibits religion in violation of the establishment clause. Some may feel that the argument is a wash; the state cannot consider religion without advancing or inhibiting religion. This article suggests that when the state is faced with such a dilemma, it should always favor the option that maximizes individual liberty.

298. McConnell, *Crossroads*, *supra* note 2, at 129.

299. *See, e.g.*, Leo Pfeffer, *The Unity of the First Amendment Religion Clauses*, *in* THE FIRST FREEDOM: RELIGION AND THE BILL OF RIGHTS 133 (1990); Bette Novit Evans, *Contradictory Demands on the First Amendment Religion Clauses: Having It Both Ways*, 30 J. OF CHURCH AND STATE 463 (1988); Leo Pfeffer, *Freedom and/or Separation: The Constitutional Dilemma of the First Amendment*, 64 MINN. L. REV. 561 (1980).

300. *See* Kurland, *Origins*, *supra* note 64.

iii. Excessive Entanglement

To consider religion as a factor in foster care placements, state agents, or private parties funded by the state, would be required to make detailed inquiries into the faith of the child, each of the natural parents, and each of the potential foster care parents. Faiths may have many subsets or sects,[301] preventing simply "pigeonholing" children as Christian, Jewish, or Muslim, for example. The state would need to delve deeply into the religious consciences of all parties involved, and this could result in such entanglement with religious issues that it would violate the Establishment Clause.

However, a state need not become so entangled. The concern is that children and their parents have the *opportunity* to have religion considered as a factor in placements. An argument that the state must find a home of the exact faith and character desired would be ridiculous. The argument here is only that the state must consider religion as one factor in the placement process.

iv. Coercion

If the Lemon test is abandoned in favor of a coercion-based test, challenges to the consideration of religion in a foster care context based upon the Establishment Clause would be likely. If an Establishment Clause challenge were made by a foster child or his or her parents, the state could not defend its practice of refusing to consider religion as a factor on grounds that allowing religion to be considered as a factor would "coerce" parents or foster children to accept some religious doctrine. If the practice were already in place, and the challenge was based upon the Establishment Clause, the challenger would have to argue that giving the opportunity to state a religious preference was a coercion to state that preference.

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301. JOHN C. ARCHER, FAITHS MEN LIVE BY (2d ed. rev. 1938).

v. Reconciling the Clauses

Full discussion of this topic is beyond the scope of this article.[302] If, in the final analysis, the conflict between the Free Exercise and Establishment Clauses cannot be resolved, the state should seek to protect individual liberty before collective liberty. Thus, if forced to choose between protecting the individual right to freely exercise religion and the collective right to avoid a state establishment of religion, a state would be wise to protect the former at the expense of the latter.

IV. RELIGION SHOULD BE CONSIDERED AS A FACTOR IN MAKING PLACEMENTS

Thus far, this article has considered the seesaw of change in the way the United States Supreme Court and Congress have required free exercise cases to be decided and has identified the interests of all parties involved in a foster care context. It remains to be seen what states must do to protect the interests of the parties involved. This section of the article begins with a discussion of the well-known case of *Wilder v. Bernstein*,[303] which involved the constitutionality of a New York statute that required the state to consider religion in making foster care placements. The second subsection will discuss the *Smith* opinion and the effect it could have had on consideration of free exercise challenges in a foster care context. It argues that a state is confronted with a "hybrid" right when the issue of religion as a factor in foster care placements is raised—an amalgamation of the child's right to freely exercise his or her religion, and the parent's right to direct the upbringing of the child. Thus, *Smith* would not have affected the test by which the issue is analyzed. Rather, the state would still be required to demonstrate an interest that rises to the level of "compelling" before it would be allowed to burden the rights of foster care children or their parents.

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302. *See* Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980).

303. 965 F.2d 1196 (2d Cir. 1992).

It is the fundamental premise of this article that *Smith* did not change the method by which the free exercise rights of foster care children and their parents should be analyzed, and that the RFRA will similarly leave the analysis untouched. It remains to be seen, however, whether the state interests described earlier may operate to vindicate a state's refusal to consider religion in the placement process.

A. *The* Wilder *Saga*

The ongoing cases of *Wilder v. Bernstein* are an excellent example of a piece of litigation that simply refuses to go away.[304] The "case" began in 1973 with the decision of the United States District Court for the Southern District of New York in *Wilder v. Sugarman*.[305] There the court considered the issue of whether the New York foster care scheme, which took religion into account as a factor in the placement process, violated the Establishment Clause.[306] The court applied the Lemon test and determined that the New York religious matching statute[307] violated both the purpose and effects prongs.[308] The purpose of the statute, according to the court, was to provide for religious training for foster care children in accordance with the wishes of the parents, and this was not a secular purpose.[309] The court found that providing state funds for this

304. For a good overview of *Wilder*, see Martin Guggenheim, *State-Supported Foster Care: The Interplay Between the Prohibition of Establishing Religion and the Free Exercise Rights of Parents and Children:* Wilder v. Bernstein, 56 BROOK. L. REV. 603 (1990).

305. 385 F. Supp. 1013 (S.D.N.Y. 1974) (per curiam).

306. The earlier New York case of *Dickens v. Ernesto* was distinguished. 281 N.E.2d 153 (N.Y. 1972). *Dickens* involved a challenge to the state's practice of considering religion in adoption proceedings. *Dickens* upheld that practice, *id.* at 157, but was distinguished in *Wilder* by the recognition that there was no state funding involved in *Dickens*. *Wilder*, 385 F. Supp. at 1023.

307. The statute provided that placement "shall be made when practicable, to an authorized agency under the control of persons of the same religious faith as that of the child." N.Y. SOC. SERV. LAW § 373(1) (McKinney 1983).

308. *Wilder*, 385 F. Supp. at 1023-24.

309. *Id.* at 1024. The Supreme Court would later rule that accommodation of free exercise does not violate the "purpose" prong of the Lemon test. Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 335 (1987).

purpose "directly support[s] the religion involved."[310] The court did not reach the issue of whether the statute violated the excessive entanglement prong of *Lemon*, although this issue would arise in subsequent proceedings.[311]

In its analysis of the free exercise issues, the first *Wilder* court found protected interests for both the parent and the child.[312] Thus, despite the Establishment Clause violation, the statute and practice "represent[ed] . . . a fair and reasonable accommodation between the Establishment and Free Exercise Clauses . . . ."[313] Accordingly, the statute was held constitutional.

In the fourth published opinion in the *Wilder* saga, the Second Circuit rejected the claim that natural parents have the right to have their child placed in a foster home with compatible beliefs.[314] The court did recognize that there was *some* protectible free exercise right, however. "So long as the state makes reasonable efforts to assure that the religious needs of the children are met during the interval in which the state assumes parental responsibilities, the free exercise rights of the parents and their children are adequately observed."[315]

What is most significant about the *Wilder* case, though, is the recognition of a child's possession of free exercise rights. In the first opinion, the court stated that the state has the duty "of fulfilling the child's Free Exercise rights."[316] The court was criticized for its citation of cases in which the Supreme Court actually held that a *parent* had the right to control the child's

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310. *Wilder*, 385 F. Supp. at 1024.

311. The court considered excessive entanglement in *Wilder v. Bernstein*. 645 F. Supp. 1292, 1331-32 (S.D.N.Y. 1986).

312. *Wilder*, 385 F. Supp. at 1025-29.

313. *Id.* at 1029.

314. Wilder v. Bernstein, 848 F.2d 1338, 1347 (2d Cir. 1988). The second *Wilder* opinion certified a plaintiff class to challenge the placement scheme. Wilder v. Bernstein, 499 F. Supp. 980 (S.D.N.Y. 1980). The third *Wilder* opinion approved a settlement decree over objections. Wilder v. Bernstein, 645 F. Supp. 1292 (S.D.N.Y. 1986). The Second Circuit's opinion in 1988, the fourth published opinion in this case, affirmed the district court's approval of the settlement decree. The case survives to this day, with the law firms and attorneys involved arguing about fees and other post-trial matters. *See, e.g.*, Wilder v. Bernstein, 965 F.2d 1196 (2d Cir. 1992).

315. *Wilder*, 848 F.2d at 1347.

316. *Wilder*, 385 F. Supp. at 1026.

religious upbringing.[317] Nevertheless, if the child is of sufficient age to state a preference and the state or agency refuses to consider it, "a free exercise suit would probably succeed."[318] Professor Horowitz makes this statement based purely on the *child's* right to freely exercise his or her religion.

The *Wilder* cases clearly emphasize and endorse the conclusion of this article that a state, in attempting to do what is in the best interest of a child, must consider religion as one of the factors in making foster care placements. The competing concerns raised in *Wilder* about the Establishment Clause were found to be insufficient to support a denial of the opportunity to have religion considered as a factor. The *Wilder* opinions were all rendered prior to the *Smith* opinion, however.

B. *The Impact of* Smith *on Free Exercise Analysis in Foster Care*

The courts in the *Wilder* opinions considered whether or not the arguments against considering religion in foster care were "compelling" enough to justify an order that the state refuse to make such considerations. If this test were reduced from "compelling" or "strict scrutiny" to "mere rationality," as the *Smith* opinion did for neutral laws of general applicability, the case would likely be decided differently. It is certainly *rational* for the state to refuse to consider religion as a factor in the process in order to satisfy the legitimate concern of quick placement.[319] Similarly, it is rational to refuse consideration of religious preference to avoid the legitimate concerns about discrimination and the Establishment Clause.

The *Smith* opinion did not change the analysis of free exercise issues in foster care placements, however, because of the hybrid rights involved. As demonstrated earlier, there are several parties who hold free exercise rights that are impacted by a state's refusal to consider religion: the natural parents,[320] the foster parents[321] and the foster child.[322] The parents also

317. *See supra* notes 194-212 and accompanying text.
318. Horowitz, *supra* note 141, at 633.
319. One could argue that this is in fact not rational, as the best interest of the child may require consideration of religion as a factor.
320. *See supra* notes 194-212 and accompanying text.
321. *See supra* notes 213-219 and accompanying text.

have a right *distinct* from the free exercise right to direct the religious upbringing of their children.[323] Justice Scalia used this distinction as an example of a hybrid right within the *Smith* opinion itself.[324] Because of the hybrid nature of the rights involved, the consideration of religion as a factor in foster care placement schemes under *Smith* would be analyzed under the compelling interest test, just as it was when the *Wilder* opinions were written. *Smith*, therefore, did not affect the test by which this issue is analyzed. When Congress passed the RFRA, then, the analysis remained unchanged. While much relief is expressed over the passage of RFRA, those who are members of the foster care community are unaffected.

V. CONCLUSION

Both foster care children and their parents have a fundamental right to exercise their religion freely. A state which refuses to consider the religious preferences of either the parent or the child burdens this right. Prior to 1990, states were required to justify all burdens upon the free exercise rights of Americans by proving a compelling interest. The *Smith* opinion changed this test, allowing a state to burden an individual's right to freely exercise religion with a neutral, generally applicable statute that is rationally related to a legitimate state purpose by the *Smith* rationale. Nevertheless, the foster care context was unsullied. Because the foster care context presents a "hybrid" right and a system of individualized exemptions, the state would still be required to prove a compelling interest before it would be allowed to deny parents and their children the opportunity to have religion considered as a factor in making foster care placements.

The RFRA returns the compelling interest test to free exercise analysis. This legislation, however, like the *Smith* opinion itself, does not affect the free exercise concerns of foster care children nor their parents. Quite simply, the religious beliefs of these people are too important to be ignored regardless of the test applied.

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322. *See supra* notes 147-193 and accompanying text.
323. *See supra* notes 66-71 and accompanying text.
324. *See* Employment Div. v. Smith, 494 U.S. 872, 881 (1990).