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Spiritual Custody: Relational Rights and Constitutional Commitments

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> And the king said, Bring me a sword. And they brought a sword before the king. And the king said, Divide the living child in two, and give half to the one, and half to the other. Then spake the woman whose the living child was unto the king, for her bowels yearned upon her son, and she said, O my lord, give her the living child, and in no wise slay it. But the other said, Let it be neither mine nor thine, but divide it. Then the king answered and said, Give her the living child, and in no wise slay it: she is the mother thereof. And all Israel heard of the judgment which the king had judged; and they feared the king: for they saw that the wisdom of God was in him, to do judgment. *1 Kings* 3:24–28

> Custody and visitation cases essentially involve salvaging operations. . . . Under the best of circumstances it is a task requiring Solomonic judgment. The difficulties involved are compounded when emotional issues such as the religious upbringing of children are involved.[1]

I. INTRODUCTION

Patricia and David Zummo were married on December 17, 1978.[2] When they divorced ten years later, the Zummos were unable to come to agreement about the religious upbringing of their three children. Prior to their marriage, Patricia and David had agreed that they would raise their children in the Jewish faith, and while they were married, "the Zummo family participated fully in the life of the Jewish faith and community."[3] But after the divorce David wanted to take the children to Roman Catholic services as he saw fit, and he refused to arrange for the children's attendance at Hebrew School during his visitation periods. Patricia Zummo, on the other hand, opposed exposing the children to a second religion. She was concerned that such a mixed spiritual message "would confuse and disorient them."[4] The Zummos brought their

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[1] Zummo v. Zummo, 574 A.2d 1130, 1132 (Pa. Super. Ct. 1990).

[2] *Id.* at 1141.

[3] *Id.*

[4] *Id.*

custody dispute to the Court of Common Pleas for Montgomery County, Pennsylvania.

The facts of the Zummo case are distressingly typical of the spiritual custody dispute. With high rates of interfaith marriage and divorce, the subject of spiritual custody is certain to be one of continuing concern.[5] To date, courts have treaded with great care on the uncertain constitutional landscape that underlies the competing claims of divorced parents who seek to control the religious education of their children. Of course, the best interests of the child are of central concern in custody cases. In spiritual custody cases, however, the First Amendment rights of the parents significantly complicate the judicial inquiry. Most courts "have refused to restrain the noncustodial parent from exposing a minor child to his or her religious beliefs or practices absent a clear, affirmative showing that these religious activities will be harmful to the child."[6] Nonetheless, it is argued that even this high degree of deference to parental authority is too open to judicial discretion. Critics of the "best interests" standard point to the "constitutional hazards" of such meddling in religious affairs—violations of either or both of the religion clauses of the First Amendment—and call for a direct prohibition of such consideration or some stricter version of strict scrutiny.[7]

I do not think ignoring these religious disputes is practically desirable. Growing up in the midst of a domestic religious civil war, given the special volatility of such disputes, is never in the best interests of the child.[8] To leave this kind of conflict to the good intentions of feuding parents is to abandon the child to a "Hobbesian space in which there is no law."[9] The reluctance of courts to intervene in spiritual custody cases is reminiscent of an earlier era in family law where "the state would not make its courts available for resolving

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[5] *See* 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 Right of Custodial Parents*, 138 U. PA. L. REV. 583, n.2 (1989).

[6] Marshall S. Zolla, *Religious Differences in Child Custody and Visitation Disputes*, LOS ANGELES LAWYER MAGAZINE (November 1998), *available at* http://www.zollalaw.com/articles-1198.htm (recognizing that in some jurisdictions, the standard is risk of some future harm).

[7] *See* Jennifer Ann Dobrac, *For the Sake of the Children: Court Consideration of Religion in Child Custody Cases*, 50 STAN. L. REV. 1609, 1620 (1998). *See generally* Timothy Sean McBride, Case Comment, *Constitutional Law—Consideration of Parents' Religions in Modifying Visitation Rights Infringes Upon Parents' Constitutional Rights*—Burrows v. Brady, 605 A.2d 1312 (R.I. 1992), 27 SUFFOLK U. L. REV. 447 (1994); R. Colin Mangrum, *Exclusive Reliance on Best Interest May Be Unconstitutional: Religion as a Factor in Child Custody Cases*, 15 CREIGHTON L. REV. 25 (1981); Paul, *supra* note 5, at 604–12.

[8] On the "best interests" standard and child psychology, see JOSEPH GOLDSTEIN, BEYOND THE BEST INTERESTS OF THE CHILD (1979).

[9] Robin West, *Gay Marriage and Liberal Constitutionalism: Two Mistakes*, *in* DEBATING DEMOCRACY'S DISCONTENT: ESSAYS ON AMERICAN POLITICS, LAW, AND PUBLIC PHILOSOPHY 260, 265 (Anita L. Allen & Milton C. Regan, Jr., eds., 1998).

disputes between husband and wife."[10] The notion of family autonomy made women and children particularly vulnerable to "unrestrained authority."[11] Beyond protection against serious harm, children were subject to public neglect "justified by the theory that only parents are responsible for them."[12] Judicial deference in spiritual custody cases presents a similar risk of neglect, similarly masked as a matter of constitutional rights.

Deference to family autonomy or parental free exercise rights in such cases may be a choice our society wishes to make, but it is not a choice that is constitutionally required. The right that people have to direct the spiritual upbringing of children, I will argue, is contingent on the commitment to the work of social ordering they have agreed to undertake as parents—that is, the right of religious parenting (1) is called into existence by a community of interests centered on the welfare of the child, and (2) may cease to exist when that community devolves into a contest of parental religious preferences.

Needless to say, the governmental structure it creates is not an end in itself. That structure is designed to help ensure a free and orderly society.[13] But the government envisioned by the Constitution is one of limited powers,[14] one that must presuppose other, nongovernmental agents of social work if ordered liberty is to flourish.[15] There is much that needs to be done, to put it simply, that government is not meant to do. In this sense, the Constitution can be understood as encouraging private actors to do the kinds of social work that government would otherwise have to do. Limited government, in short, is "based on an ethic of relational obligation . . . ."[16] The social duties we undertake ensure the survival of the core constitutional principle that government "is limited in it powers."[17]

We have come to believe that the Constitution, through the Bill of Rights and the protections (both substantive and procedural) of the Fourteenth Amendment, guarantees individual rights against government interference. But

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[10] MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 270 (1990).

[11] *Id.* at 276.

[12] *Id.* at 271.

[13] *See* M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403 (1819) ("The government . . . is 'ordained and established' in the name of the people; and is declared to be ordained, 'in order to form a more perfect union, establish justice, ensure domestic tranquility, and secure the blessing of liberty to themselves and their posterity.'") (quoting U.S. CONST. pmbl.).

[14] *See id.* at 405 ("This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted.").

[15] The reference to "ordered liberty" is Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[16] MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY 122 (1993).

[17] 17 U.S. (4 Wheat.) at 406.

as a blueprint for political community, the Constitution does not really take notice of the truly private actor. Rather, the Constitution concerns itself with those who participate in the life of the community, and it rewards those who seek self-fulfillment in the work of social ordering. It rewards them negatively, by not intruding into their affairs. It rewards them affirmatively, by granting them rights not given to other people.

When parents obligate themselves to work together to raise children, they serve relational values, what Robin West calls the "communal essence"[18] of intimate relationships. They give the child a base from which to move to the greater communities beyond the family. The free exercise right to determine the child's religious choices derives from this commitment. It does not belong to the parents individually; it belongs to them only as members of the family community. The unique privilege and special constitutional status of religious parenting has been implicitly recognized, if only occasionally so, in the Court's modern free exercise jurisprudence. Where the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability, the First Amendment bars application of such a law to religiously motivated action that involves the Free Exercise Clause with the right to parent.[19] The parent, that is, gets a constitutional privilege because he fulfills the duty assigned in our constitutional scheme to the private realm of the family.

The scope of that privilege, however, should not be separated from its purpose. The privilege, properly understood as the product of a constitutional "hybrid situation"[20] (the conjunction of free exercise and parenting rights) is hardly earned when parents are in conflict in a child custody case, when they have failed to situate the child in a community of belief (or non-belief). In this case, the free exercise right should no longer convey the right to determine the spiritual education of the child. Because each parent would have an equal claim on the child's conscience, the state must intervene to do the work that private ordering failed to do. When the court intervenes, it does so to protect the child from a destructive contest of parental wills.

It is my contention that, in determining what is in the best interests of the child, the courts should not be obligated to apply heightened scrutiny to judicial inquiry of the religious beliefs and practices of custodial candidates. Religious factors should be considered when doing so is in the best interests of the child, and no showing of harm or the risk of harm should be required as a constitutional prerequisite to such consideration. The Free Exercise Clause does not require such judicial deference to parental will, nor does the Establishment Clause prohibit it. While consideration of the intrinsic merits of either parent's religious beliefs is not constitutionally permissible, the courts can and should determine custody arrangements by taking into account such

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[18] West, *supra* note 9, at 269.

[19] *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990).

[20] *Id.* at 882.

"religious" factors as the pre-divorce religious education of the children or the irreconcilability of parental religious beliefs. The courts can and should restrict the right of religious parenting when doing so is in the best interests of the child. In many cases of religious dispute, doing so will not be in the best interests of the child. In some circumstances, exposure to alternative religious traditions will not cause emotional distress or identity confusion.[21] Indeed, some commentators have recommended exposing children to different religious traditions.[22] But the court should have the discretion to fashion a religious settlement that makes its paramount interest the welfare of the child, even at the cost of religious parenting rights.

Judicial deference to parental dominion in spiritual custody cases looks to each parent as a bearer of individual rights. In his study of family law, Milton C. Regan, Jr. observes, I think rightly, that "[r]ights discourse traditionally has focused on the relationship between the individual and the state, but many family law issues involve conflicting individual rights claims."[23] Because spiritual custody cases involve equally compelling free exercise claims, the neutrality that defers to the parent as an "acontextual rights-bearer"[24] offers no basis for resolving the conflict. Thus, the spiritual custody case serves as a particularly good place from which to reconsider the productiveness of a privacy-based rights jurisprudence. Michael J. Sandel, among others, has argued that a focus on privacy rights, and the notion of the autonomous self from which such rights arise, has transformed the idea of the family from one of community to a shifting configuration of competing interests.[25] For Sandel, modern developments in family law "reflect the liberal conception of persons as unencumbered selves independent of their roles and unbound by moral ties they choose to reject."[26] This understanding of personhood "loosens the relation between the self and its roles; it makes family roles easier to shed and relaxes the obligations that attaches to them."[27] The privileging of the private actor reinforces the loss of the family as a community enterprise. In the case of child custody and visitation disputes involving religious differences, the result is that, unless there are exceptional circumstances, the courts allow an unseemly and constitutionally unnecessary competition for the child's spiritual mentorship.

The social costs of a focus on the unencumbered self are especially troublesome because privacy as a basis for generating rights has not lived up to its promise. Quite the opposite is the case. Privacy has often produced a

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[21] *See, e.g.*, Zummo v. Zummo, 574 A.2d at 1155–57 (suppressing a portion of the child's religious heritage may create serious emotional harm).

[22] *Id.*

[23] REGAN, *supra* note 16, at 135.

[24] *Id.*

[25] MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 91–119 (1996).

[26] *Id.* at 112.

[27] *Id.*

jurisprudential dead-end, the natural limits of autonomy having limited the natural expansion of rights. Focusing on rights as individual liberty interests allows for some fine line-drawing, and the privacy rights perimeter has at times been strangely drawn. We have the right to end our lives (by refusing medical treatment),[28] for instance, but we do not have the right to medical assistance in ending our lives.[29] We have the right to direct the upbringing of our children, but not to visit our grandchildren.[30] The focus on individual liberty has even threatened established privacy rights by allowing the courts to circumscribe those rights within an increasingly restrictive definition of autonomous activity.[31] Focusing instead on rights as contingent on relationships that do the work of social ordering is a creative and flexible alternative to the many constitutional questions that cannot be cabined within the narrow confines of the private spheres of self and family.[32]

In response to the jurisprudential narrowness of classical liberalism, Sandel and other values-oriented theorists would substitute some form of moral majoritarianism for the procedural neutrality of a rights-based jurisprudence. But whatever substantive "good" is made the basis for

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[28] *See* Cruzan v. Dir., MO Dep't of Health, 497 U.S. 261 (1990).

[29] *See* Washington v. Glucksberg, 521 U.S. 702 (1997).

[30] *See* Troxel v. Granville, 530 U.S. 57 (2000).

[31] *See, e.g.*, Scott E. Sundby, *Everyman's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*" 94 COLUM. L. REV. 1751, 1789–90 (1994) ("To maintain privacy, one must not write any checks nor make any phone calls. It would be unwise to engage in conversation with any other person, or to walk, even on private property, outside one's house. If one is to barbecue or read in the backyard, do so only if surrounded by a fence higher than a double-decker bus and while sitting beneath an opaque awning. The wise individual might also consider purchasing anti-aerial spying devices if available (be sure to check the latest Sharper Image catalogue). Upon retiring inside, be sure to pull the shades together tightly so that no crack exists and to converse only in quiet tones. When discarding letters or other delicate materials, do so only after a thorough shredding of the documents (again see your Sharper Image catalogue); ideally, one would take the trash personally to the disposal site and bury it deep within. Finally, when buying items, carefully inspect them for any electronic tracking devices that may be attached.").

[32] For a general critique of privacy-based rights jurisprudence, see AMITAI ETZIONI, THE LIMITS OF PRIVACY 1–15 (1999). For feminist jurisprudence critical of liberalism, see, for example, CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7 (1989); Carole Pateman, *Feminist Critiques of the Public/Private Dichotomy*, *in* PUBLIC AND PRIVATE IN SOCIAL LIFE, 281 (Stanley I. Benn & Gerald F. Gaus eds., 1983); Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559 (1991). On rights as relational in nature, see, for example, Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, *in* CHILDREN'S RIGHTS RE-VISIONED, 42 (Rosalind Ekman Ladd ed., 1996). On relational rights and family law, see, for example, MINOW, *supra* note 10, at 227–311; REGAN, *supra* note 16, at 118–53.

communitarian and republican critiques of liberalism, that value is bound to demean contrary ideas of the public good and, in the interest of moral consensus, to run the danger of taking as normative whatever is "democratically" popular.[33] The dismissal of difference is of particular concern in an area such as family law, where the notion of what is normative implicates our most intimate connections.[34] It is, thankfully, too late in the day to make civil liberties "an incidental aspect of democratic theory."[35]

With its focus on participation in relationships of interdependent obligation, a relational rights approach pays homage neither to personal autonomy nor social consensus. From a relational rights point of view, the core constitutional value is the work of caring that a limited government cannot afford to do. Where people are willing to care for each other in communities of interdependent obligation, the substantive ends of constitutional commitments are met and substantive rights are earned. Beyond that, government can and should remain neutral as to a vision of the good life. But the rights that attend the making of such commitments are contingent on the relationships that call them into existence; and, as this essay argues in regard to religious parenting, relational rights, because they are earned rights, alienable. When the community of interest that calls forth the right of religious parenting is replaced by a conflict of interests destructive to the child, the right to control the religious destiny of the child may be lost.

This essay will consist of four parts:

II. The Spiritual Custody Case: *Zummo v. Zummo*

This Pennsylvania custody case provides a detailed and influential analysis of spiritual custody issues as well as a rigorous defense of the prevailing constitutional standard. In this section of the essay, I review in detail the court's First Amendment reasoning. That reasoning reflects the

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[33] I include both republican and communitarian theorists as advocates of a values-oriented approach to constitutional rights. On modern republicanism, see PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 241–70 (1999); Frank Michelman, *Law's Republic*, 97 YALE L. J. 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L. J. 1539 (1988); *see also* MARK TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988). For a critique of republican theory, see Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801 (1993). For a survey of contemporary communitarianism, see generally SANDEL, *supra* note 25; DEBATING DEMOCRACY'S DISCONTENT: ESSAYS ON AMERICAN POLITICS, LAW, AND PUBLIC PHILOSOPHY (Anita L. Allen & Milton C. Regan, Jr., eds. 1998); NEW COMMUNITARIAN THINKING: PERSONS, VIRTUES, INSTITUTIONS, AND COMMUNITIES (Amitai Etzioni ed., 1995).

[34] On the tendency to identify difference as non-normative, see Minow, *supra* note 10, at 19–48.

[35] Gey, *supra* note 33, at 879.

individualistic biases of modern rights jurisprudence: a privileging of the isolated actor as the repository of inalienable rights and the family as a private sphere best left free from state intervention.

III. Duty Bound: Free Exercise and the Encumbered Self

The free exercise right—as understood by Jefferson and Madison, and for many years by the Supreme Court—is contingent on the believer's subjection to religious duty, a duty higher than that owed to the state.[36] The existence of the civil right is contingent on the spiritual obligation that calls it into existence. Modern free exercise cases, on the other hand, treat the right of religious liberty as a matter of individual choice, and, accordingly, adopt a posture of neutrality in spiritual custody cases.[37] But it is precisely because both parents have equal free exercise claims that the neutral, rights-oriented stance of traditional liberalism is unable to settle the question. The attempt to "split the difference" in spiritual custody cases fails to take the religious imperative seriously. Worse, it is hardly consistent with the best interests of the child.

IV. Religious Parenting and Constitutional Commitments

The right to parent includes the "inculcation of . . . religious beliefs."[38] The right "to direct the religious upbringing of their children" is an uncontested "part of the parental bundle of rights."[39] It is a powerful and remarkable privilege to control the spiritual consciousness of another. We could imagine a society that does not allow parents to take such liberties with their children.[40] However, assume the welfare of a child is an equally remarkable duty, and we accordingly defer to parents who undertake this great social responsibility. When the interests of parenthood are combined with a

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[36] *See infra* at 24–27.

[37] *See, e.g.*, Zummo v. Zummo, 574 A.2d at 1139–40 (Pa. Super. Ct. 1990) ("One parent may be a Republican and the other a Democrat, one may be a Capitalist and the other a Communist, or one may be a Christian and the other a Jew.").

[38] *Id.* at 1146.

[39] Dobrac, *supra* note 7, at 1620.

[40] *See, e.g.*, Hugh LaFollette, *Freedom of Religion and Children*, 3 PUB. AFF. Q. 75 (1989), *available at* http://www.stpt.usf.edu/hhl/papers/freedom.of.religion.and.children.htm (arguing that the right of free exercise requires allowing children to be exposed to alternative religious views); *see also* James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371 (1994) (suggesting that religious parenting rights are inconsistent with the generally accepted principle that individuals do not have the right to control others). On the right of foster children to assert religious preferences, see Kelsi Brown Corkran, Comment, *Free Exercise in Foster Care: Defining the Scope of Religious Rights for Foster Children and Their Families*, 72 U. CHI. L. REV. 325 (2005).

free exercise claim, the private realm of family life is subject to judicial limitation only "if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."[41]

This section of the essay looks at two lines of free exercise cases that would appear to be at constitutional odds. From *Prince* to *Smith*, the Court has limited the scope of religious parenting rights.[42] From *Pierce* to *Yoder*, the Court has given parents wide latitude to direct the religious upbringing of their children.[43] But the *Yoder* and *Smith* jurisprudential traditions are not as inconsonant as they might seem. The Court has been consistent in construing the right of religious parenting as something more than an individual privacy right. The right to direct a child's religious upbringing belongs to the family as a community of interests, a community that does much of the work of private ordering. Taken together, *Yoder* and *Smith* teach us that the right of religious parenting inheres in communal relationship. When the family community is dissolved, the right is dissipated; and the state must step in to ensure that the interests of society as a whole are not endangered.

V. Revisiting the Spiritual Custody Case

In this section, I argue that the interests of the child should prevail in spiritual custody cases regardless of parental religious preferences. The *Zummo* court's free exercise inquiry, I will argue, conflates free exercise and religious parenting rights. By doing so, it applies to spiritual custody cases an unjustifiably strict level of judicial scrutiny. As well, the court's Establishment Clause confuses an inquiry into the intrinsic merits of religious beliefs with an assessment of the effect of parental conflict about religion on the temporal well-being of the child. Further, the fact-sensitive nature of the "best interests" inquiry is most true to the unique constitutional status of the family community, reflecting the broader notion that the scope of individual rights needs to be determined with reference to the network of relationships that give those rights meaning.

II. THE SPIRITUAL CUSTODY CASE

Zummo v. Zummo[44] provides a rich treatment of spiritual custody questions and a thorough defense of the prevailing constitutional standard.[45] It

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[41] Wisconsin v. Yoder, 406 U.S. 205, 234 (1972).

[42] *See* discussion *infra* part IV.

[43] Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925); *Yoder*, 406 U.S. 205.

[44] 574 A.2d 1130 (Pa. Super. Ct. 1990).

[45] *See id.* at 1141 ("We find that the requirement of a 'substantial threat' of 'physical or mental harm to the child' is applicable to the proposed restrictions on a parent's post-divorce parental rights regarding the religious upbringing of his or her children.").

also provides ample testimony to the seductive power of a privacy-based rights jurisprudence. The court treated religious custody as it would any other matter of family dispute, seeing its own function as that of a neutral arbiter, "as providing a framework for private resolution of family matters."[46] But the peculiar obligations of religious belief render such a resolution unworkable. With its eye keenly on individual parental rights, the court ignored the relational context from which the right of religious parenting emerges and in which it is exercised.

The facts of the case are unremarkable.[47] Pamela and David Zummo were married on December 17, 1978; they were divorced ten years later.[48] Three children were born of the marriage: Adam, age 8; Rachel, 4; and Daniel, 3.[49] Pamela was raised as a Jew, David as a Roman Catholic.[50] Prior to their marriage, the couple agreed that any children would be raised in the Jewish faith.[51] During the marriage, the family "participated fully in the life of the Jewish faith and community."[52] Before the parents separated, "the children attended no religious services outside the Jewish faith."[53] Adam was beginning to prepare for his Bar Mitzvah; Rachel was soon to begin her formal Jewish education and training.[54] After separation, David Zummo (while exercising visitation rights on alternate weekends) refused to take Adam to Hebrew Sunday School.[55] In addition, David requested to take the children, on occasion, to Roman Catholic services.[56] While David suggested that "the children would benefit from a bi-cultural upbringing and should therefore be exposed to the religion of each parent,"[57] Pamela "oppose[d] exposing the children to a second religion which would confuse and disorient them."[58]

The Court of Common Pleas entered an order that "obligated [David] during his weekend visitations to arrange for the children's attendance at their Synagogue's Sunday School."[59] In addition, David was not "permitted to take the children to religious services contrary to the Jewish faith."[60] (The latter provision was not meant "to prevent [David] from taking the children to

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[46] REGAN, *supra* note 16, at 137.
[47] *See* Zummo v. Zummo, 574 A.2d at 1141.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.* at 1142.
[60] *Id.*

weddings, funerals, or family gatherings,"[61] nor "to prevent [him] from arranging for the presence of the children [at] events involving Christmas and Easter."[62] The trial court applied the best interests of the child standard to the facts, a standard that, under state law, allowed for consideration of "all factors which legitimately impact upon the child's physical, intellectual, moral and *spiritual* well-being."[63] With this standard in mind, the court noted several factors supporting its conclusion "that restrictions upon David's right to expose his children to his religious beliefs were permissible and appropriate"[64]:

> [T]he Zummo's [sic] had orally agreed prior to their marriage that any children to their marriage would be raised as Jews; during the marriage the children were raised as Jews; it was in the children's best interests to preserve the stability of their religious beliefs; the father's practice of Catholicism was only sporadic while the mother's practice of Judaism had been active; Judaism and Catholicism are irreconcilable; and, exposure to both religions might "unfairly confuse and disorient the children, and perhaps vitiate all benefits flowing from either religion.[65]

Relying heavily upon *Yoder*,[66] the superior court found that consideration of religious factors as part of the "best interests" analysis was improper.[67] The lower court's order was found to "encroach impermissibly" upon constitutionally protected parental rights and religious freedoms.[68] In short, the lower court had miscalculated the limitations that the Constitution places upon "the application of the *spiritual* well-being components of the best interests analysis."[69] The court's reasons for rejecting any consideration of religious factors are typical of the concerns voiced in spiritual custody cases (and, thus, I review them in some detail).

A. Pre-Divorce Religious Training Agreement

In addition to finding that pre-divorce agreements "are generally too vague to demonstrate a meeting of minds,"[70] the Superior Court held that (1) "enforcement of such an agreement would promote a particular religion, serve

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[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.* (citing Zummo v. Zummo, 121 Mont. Co. L. Rptr. 251, 253–56 (1988)).
[66] 406 U.S. 205.
[67] Zummo v. Zummo, 574 A.2d at 1142.
[68] *Id.*
[69] *Id.*
[70] *Id.* at 1144.

little or no secular purpose, and would excessively entangle the courts in religious matters"[71] and (2) "enforcement would be contrary to a public policy embodied in the First Amendment Establishment and Free Exercise Clauses (as well as their state equivalents) that parents be free to doubt, question, and change their beliefs, and that they be free to instruct their children in accordance with those beliefs."[72] The religious freedom of the parent, the

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[71] *Id.* (The excessive entanglement difficulties are also manifest in the instant case. The father is prohibited from taking his children to 'religious services contrary to the Jewish' faith. What constitutes a 'religious service?' Which are 'contrary' to the Jewish faith? What for the matter is the 'Jewish' faith? Orthodox, Conservative, Reform, Reconstructionist, Messianic, Humanistic, Secular and other Jewish sects might differ widely on this point. An exemption is provided for weddings, funerals, and 'family gatherings and events involving family traditions at Christmas and Easter.' How does one determine which events are 'family gatherings or events?' How does one determine when a practice becomes a 'tradition?' How broadly are 'Christmas' and 'Easter' defined? Do they include Advent? Epiphany? Lent? The Ascension? Pentecost? Both the subject matter and the ambiguities of the order make excessive entanglement in religious matters inevitable if the order is to be enforced.) (citations omitted) *Id.* at 1146.

[72] *Id.* (Finally, there is a broader and more fundamental . . . problem with enforcement of such agreements. Enforcement plainly encroaches upon the fundamental right of individuals to question, to doubt, and to change their religious convictions, and to expose their children to their changed beliefs. The constitutional freedom to question, to doubt, and to change one's convictions, protected by the Free Exercise and Establishment Clauses, is important for very pragmatic reasons. For most people religious development is a lifelong dynamic process even when they continue to adhere to the same religion, denomination, or sect. It is also generally conceded that the transmission and inculcation of religious beliefs in children is both active and passive, is shared by both parents, and is affected by a wide variety of external factors. Importantly, it is also generally acknowledged that it would be difficult, if not impossible, for an interreligious couple engaged to be married to project themselves into the future so as to enable them to know how they will feel about religion, if and when their children are born, and as the children grow; and that it would be still more difficult for such a couple to attempt to project themselves into the scenario of a potential divorce after children were born, in order to accurately anticipate the circumstances under which religious upbringing agreements would be enforced if such agreements were given legal effect. Consequently, while religious upbringing agreements may serve an important and beneficial purpose by promoting careful consideration of potential difficulties prior to marriage, and also may carry moral weight and religious sanction, parties entering into such agreements generally will not be able to anticipate the fundamental changes in circumstances between their prenuptial optimism, their struggles for accommodation, and their ultimate post-divorce disillusionment. Consequently, a hopeful and perhaps naive prenuptial assurance of a future commitment to an agreed (usually vague) course of religious instruction for then as yet unborn children in the event of divorce (an often unconsidered possibility), must remain as legally unenforceable in civil courts as the wedding vows the parties even more solemnly exchanged.) (citations and footnotes omitted) *Id.* at 1146–47.

Superior Court concluded, may yield to other compelling interests, but it may not be bargained away.[73]

B. The Children's Pre-Divorce Religious Training

The Superior Court rejected the lower court's finding that the children had been assiduously grounded in the Jewish faith.[74] Similarly, there was no basis for the trial court's characterization of Judaism as the 'children's chosen faith.[75] The Superior Court reasoned that "[i]n order to avoid arrogating to itself unconstitutional authority to declare orthodoxy in determining religious identity, courts only recognize a *legally* cognizable religious identity when such an identity is asserted by the child itself, and then only if the child has reached sufficient maturity and intellectual development to understand the significance of such an assertion."[76] But "even if the children had expressed a personal religious identity,"[77] the free exercise rights of the parents might be a constitutional trump card: "it is not clear that the children would have had any constitutional right to resist, or to be protected from, attempts by either parent to exercise their constitutional rights to inculcate religious beliefs in them contrary to their declared preferences prior to their legal emancipation."[78] Referring to *Parham v. J.R.*,[79] the Superior Court observed that a majority of the Supreme Court, consistent with *Meyer* and *Pierce*, strongly suggested "that no such rights existed."[80]

C. Stability of the Children's Religious Beliefs

The lower court followed the traditional principle that "the desire to promote or maintain stability in the already tumultuous context of a divorce is generally a significant factor in custody determinations."[81] The trial court viewed "stability and consistency in a child's religious education as an

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[73] *Id.* at 1148.

[74] *Id.* at 1148–50.

[75] *Id.*

[76] *Id.* at 1149. ("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.").

[77] *Id.*

[78] *Id.*

[79] 442 U.S. 584, 603–04 (1979) (rejecting action brought by minor children who alleged that they had been deprived of their liberty without procedural due process by virtue of state health laws that permit voluntary admission of minor children to mental hospitals by parents or guardians).

[80] Zummo v. Zummo, 574 A.2d at 1149.

[81] *Id.* at 1152.

important factor in determining the best interests of the child."[82] The Superior Court disavowed the suggestion "that *governmental* interests in maintaining stability in *spiritual inculcation* exist which could provide a justification to encroach upon constitutionally recognized parental authority and First Amendment Free Exercise rights of a parent to attempt to inculcate religious beliefs in their children."[83] Holding that "[n]otwithstanding the genuine comfort and reassurance a child *may* derive from *any* religion in a time of turmoil like divorce, government simply cannot constitutionally prefer stability in religious belief to instability":[84]

> Stability in a path to damnation could not be said to be more in a child's "best interests" than an instability which offered the hope of movement toward a path to eternal salvation. Similarly, if all religions or a particular religion were merely harmful and repressive delusion, then stability in such a delusion could not be said to be more in a child's "best interests" than instability which might pave the way to escape from the delusion. Because government cannot presume to have any knowledge as to which if any religions offer such eternal rewards or repressive delusions, and may not declare the complete absence or the universality of such eternal rewards or repressive delusions, a child's "best interests" with regard to the *spiritual* aspect of religion cannot be determined by any governmental authority.[85]

D. Relative Parental Devoutness

The trial court contrasted the mother's "active" participation in Jewish religious activities with the father's "sporadic" participation in Catholic religious activities.[86] The Superior Court assumed that the lower court's "best interests" analysis amounted to a preference in custody disputes to religiously devout parents.[87] Citing *County of Allegheny v. ACLU* to the effect that "[n]o person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance,"[88] the court held that "neither determination of, nor consideration of parents' relative devoutness or activeness in religious activities has any place in custody determinations."[89]

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[82] *Id.* at 1150 (quoting Zummo v. Zummo, 121 Mont. Co. L. Rept. at 254).
[83] *Id.* (footnote omitted)
[84] *Id.*
[85] *Id.*
[86] *Id.* at 1152. (quoting Zummo v. Zummo, 121 Mont. Co. L. Rptr. at 251, 255).
[87] *See id.* at 1152–53.
[88] *Id.* at 1152 (quoting County of Allegheny v. ACLU, 492 U.S. 573, 591 (1989)).
[89] *Id.*

Such an inquiry, the court concluded, would violate the Establishment Clause.[90]

E. Relevance of Perceived Difference in Religions

Taking notice of the theological incompatibility of Judaism and Roman Catholicism, the trial court found that such a conflicted religious environment would be harmful to the children.[91] The superior court held that in the absence of a showing of substantial threat of harm to the child, irreconcilable religious differences would not provide a basis for restricting a parent's custody rights.[92]

F. Perceived Possibility of Harmful Effect from Exposure to "Inconsistent" Religions

The trial court concluded that "to expose the children to a competing religion after so assiduously grounding them in the tenets of Judaism would unfairly confuse and disorient them."[93] This presumption of harm was rejected by the superior court. Though exposure to parental religious conflict might cause stress, the court observed that "stress is not always harmful."[94] In fact, according to the superior court, the process of maturation requires that children "view and evaluate their parents in the bright light of reality. Children who learn their parents' weaknesses and strengths may be able better to shape life-long relationships with them."[95] In addition, the court insisted that, in order to justify governmental intervention in a religious upbringing dispute, any stress must arise from doctrinal religious differences, not from the matter in which the dispute is conducted.[96]

Typical of spiritual custody decisions, the *Zummo* opinion rests upon the rights of the individual parent removed from "the complex layers of interdependence that characterize intimate relationships."[97] Its focus on "isolated rights"[98] is consistent with the stance of classical liberalism that marks the family as a private domestic sphere, a refuge from state control and community obligation.[99] The premise of modern family law is that "the vessel

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[90] *Id.* at 1152. For a similar point of view, see Note, *The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interests Equation*, 82 MICH. L. REV. 1701 (1984).

[91] *Id.* at 1153.

[92] *Id.* at 1154.

[93] *Id.* (quoting Zummo v. Zummo, Mont. Co. L. Rptr. at 255).

[94] *Id.* at 1155.

[95] *Id.*

[96] *Id.* at 1156.

[97] REGAN, *supra* note 16, at 135.

[98] *Id.*

[99] *See, e.g.*, Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787 (1995).

of family shouldn't be filled with substantive moral content, but should be left empty so that individuals can use it for their own purposes."[100] Family law, seen from this view, "should remain neutral among visions of the good life, intervening only when necessary to prevent one individual from harming another."[101] This posture of liberal neutrality in the name of parental rights is constitutionally unnecessarily and practically undesirable. In the remainder of this essay, I argue that such a premise fails to take into account the special nature of religious obligation (part III) and the peculiar constitutional status of the religious parenting right (part IV).

Nor (as I suggest in part V) is a narrowly conceived focus on individual rights consistent with the unique territory occupied by the family, a constitutional borderland between the private actor and the political collective. The state has never really "'stayed out' of the 'private' realm of families."[102] "The very definition of 'family' rests upon legal regulation of the type of private relationships that are and are not recognized as families."[103] State regulation of the family—from regulation of the marriage contract and its dissolution to the legal obligations of family members[104]—is part of an "ongoing process of shaping, articulating, and enforcing community norms concerning the good life for families and their children."[105] For values-oriented theorists, the family is the breeding ground of community norms and the means by which public values are transmitted.[106]

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[100] REGAN, *supra* note 16, at 2.

[101] *Id.*

[102] JYL J. JOSEPHSON, GENDER, FAMILIES, AND STATE: CHILD SUPPORT IN THE UNITED STATES 6 (1997).

[103] *Id.* at 5–6.

[104] *See* Dailey, *supra* note 99, at 1827–28 ("A fundamental flaw in the traditional liberal distinction between the public realm of politics and the private realm of family life lies in the fact that government has always exerted a powerful, and often primary, influence within the domestic sphere. In addition to the infinite ways in which the law indirectly affects family life, state laws directly govern who may marry, when they may marry, the consequences of divorce, and, perhaps most important, the terms and obligations of parenthood. While the state cannot prevent fertile couples from bearing a child, the law monitors parental fitness by way of abuse and neglect statutes, and the states all claim the ultimate power to terminate parental rights altogether. Most dramatically, at moments of family transition, whether upon divorce, death, or the intervention of child welfare agencies, the state assumes authority for determining key issues of family life. In addition to financial matters, the state determines what is in the best interests of the child, an open-ended legal standard that requires the decision-maker to draw upon substantive values and ideals surrounding the welfare of children.") (footnotes omitted).

[105] *Id.* at 1828.

[106] *See* JOSEPHSON, *supra* note 102, at 17–19; Linda C. McClain, *Care as a Public Virtue: Linking Responsibility, Resources and, Republicanism*, 76 CHI.-KENT L. REV. 1673 (2001) (discussing family care as a republican virtue). On the relation of communitarianism to family care, see, for example Bruce C. Hafen, *The Constitutional*

Within the realm of the family, the place of the parent has special constitutional significance. The Constitution does not give the government a general power to dictate how children will be raised. It is assumed that private actors will do this work, and when they do, they are given a remarkable grant of rights. The reason for that right is far from uncontested, however. For the liberal, the right to parent free from state interference is part of the core meaning of family privacy.[107] The communitarian or republican theorist, as we would expect, offers "a civic justification for parental rights."[108] When the Supreme Court has considered the proper place of the family in the constitutional order, it has borrowed from both theoretical approaches. It is a commonplace of constitutional law that parents have the liberty "to direct the upbringing and education of children under their control."[109] But that liberty is not without the attendant duty to prepare the child for civic responsibilities. The "custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[110] When parents do this work of preparation, the law "respect[s] the private realm of family life which the state cannot enter."[111] The Supreme Court has been consistent in this pairing of parental rights and responsibilities: "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."[112] But the Court has not sought to define those obligations with much precision, preferring liberal

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Status of Marriage, Kinship, and Sexual Privacy: Balancing the Individual and State Interests, 81 MICH. L. REV. 463 (1983); Mary Lyndon Shanley, *Unencumbered Individuals and Embedded Selves: Reasons to Resist Dichotomous Thinking in Family Law*, *in* DEBATING DEMOCRACY'S DISCONTENT: ESSAYS ON AMERICAN POLITICS, LAW, AND PUBLIC PHILOSOPHY 229 (Anita L. Allen & Milton C. Regan, Jr., eds. 1998).

[107] *See id.* at 267–311; *see also* JOSEPHSON, *supra* note 102, at 15–17; REGAN, *supra* note 16, at 1–2 (contending that "the vessel of the family shouldn't be filled with substantive moral content, but should be left empty so that individuals can use it for their own purposes."); Dailey, *supra* note 99, at 1826–35. For a defense of family privacy from a rights-oriented perspective, see CHARLES FRIED, RIGHT AND WRONG 151–54 (1978); ROBERT NOZICK, ANARCHY STATE AND UTOPIA 167–74 (1974); JOHN RAWLS, A THEORY OF JUSTICE 467–72 (1972).

[108] Dailey, *supra* note 99, at 1833; *see also* Hafen, *supra* note 106, at 470–71 ("[I]ndividual and the social interests are so intertwined in family cases that meaningful analysis of the competing interests is rendered impossible by current civil liberties approaches that always give the individual interest a procedurally exalted priority over the social interest. Great need exists for a method of constitutional analysis that will allow for explicit consideration of the social interest in domestic relations.").

[109] Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925).

[110] Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[111] *Id.*

[112] *Yoder*, 406 U.S. at 233 (quoting *Pierce*, 268 U.S. at 534–35).

neutrality to a more substantive vision of the good life or civic virtue. Thus, the family has emerged as a constitutional entity that mediates the claims of privacy and government neutrality on the one hand and the claims of community on the other.

It is this problematic task of mediating individual and communal imperatives that is customarily ignored in the spiritual custody case. The prevailing standard of deference to parental preferences is little more than a "mechanical assertion"[113] of constitutional rights (generated by the fear of the assertion of some religious value). But a values-oriented approach to rights is not much better situated to deal with a religious custody case. The Court has made the argument that religion is a great conservator of public morals and order,[114] a fit object for state support (though a communitarian or republican theorist is likely to feel that the case has not been made strongly enough). Where a privacy-based jurisprudence fails to address the problematic nature of the spiritual custody case, a more values-oriented offers little guidance to the court. Religion may or may not be a social good,[115] but a domestic religious civil war is hardly consonant with the inculcation of civic virtue. From a values-oriented point of view, the court would have to decide whether it is better to have one religion, two religions, or no religion—not better for the child, but better as a substantive value. (Surely, fatherhood is a social good, but it does not necessarily follow that two fathers are better than one.[116]) That decision runs a much greater risk of meddling in religious affairs than does a determination of the effect that parental religious disagreement will have on the child.

III. DUTY BOUND: FREE EXERCISE AND THE ENCUMBERED SELF

The free exercise of religion occupies a position of privilege in the constellation of constitutional rights. It is, of course, first in priority. But the reason for its celebrated constitutional position is commonly misunderstood and the "broader mission"[117] of religious liberty accordingly diminished. For traditional liberalism, "the case for religious liberty derives not from the moral

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[113] REGAN, *supra* note 16, at 135.

[114] *See* Wallace v. Jaffree, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting).

[115] On religion and civic virtue, see Sunstein, *supra* note 33, at 1578 ("Interpretations of the establishment clause should recognize the role of religious organizations in the cultivation of republican virtues; approaches to the clause that end up disfavoring religion undervalue the role of intermediate organizations in a pluralistic society"); Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 736–37 (1986).

[116] *See* Michael H. v. Gerald D., 491 U.S. 110, 131 (1989) ("[T]he claim that a State must recognize multiple fatherhood has no support in the history or traditions of this country.").

[117] SANDEL, *supra* note 25, at 67.

importance of religion but from the need to protect individual autonomy . . ."[118] It derives, that is, from a premise of procedural neutrality. [G]overnment should be neutral toward religion for the same reason it should be neutral toward competing conceptions of the good life generally—to respect people's capacity to choose their own values and ends.[119]

The "liberating promise"[120] of this conception of religious freedom is a relatively new phenomenon, a product of a self-oriented society and a jurisprudence premised on a foundation of voluntarism and individual rights. But for Jefferson and Madison, religious freedom was a creature of a quite different nature. "[T]heir argument for religious liberty relies heavily on the assumption that beliefs are not a matter of choice."[121] They are the dictates of conscience, the expression of a duty towards the Creator. Because religion "can be directed only by reason . . ., not by force or violence,"[122] it follows that "the Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate."[123] The believer, it might be said, is spiritually encumbered.

For Jefferson, it followed that the state cannot require support for religion. If religious beliefs are not governed by the autonomous will, if religious beliefs are involuntary,[124] a general assessment to support religious institutions asks the believer to make a choice he cannot make. He is not free to change those beliefs, or, in Madison's words, to "follow the dictates of other men."[125] Freedom of religion is inalienable because it is a duty owed to a power higher than civil society:

> This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.[126]

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[118] *Id.* at 66.

[119] *Id.*

[120] *Id.*

[121] *Id.* at 65.

[122] James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* THE SUPREME COURT ON CHURCH AND STATE 18 (Robert S. Alley ed., 1988).

[123] *Id.* at 299–300.

[124] On the voluntarism of religious belief and Jefferson's "Bill for Establishing Religious Freedom," see SANDEL, *supra* note 25, at 65.

[125] Madison, *supra* note 122.

[126] *Id.* at 18–19.

The right to free exercise, as conceived by Madison and Jefferson, is contingent on the believer's subjection to religious duty. The right exists only because a duty higher than that owed to the state exists, and only to the extent that the believer accepts such a duty. The existence of the right, in other words, is contingent on the obligation that calls it into existence. The right inheres in the relationship.

When free exercise claims reached the Court, it assumed a non-voluntarist model of religious belief (though it did not concede that matters of religion are wholly exempt from the cognizance of civil society). In 1890, in *Davis v. Beason*, the Court considered whether the advocacy of bigamy and polygamy was "a tenet of religion."[127] Following Madison's assertion that religion is "the duty which we owe to our creator, and the manner of discharging it,"[128] the Court grounded its definition of religion on the existence of a divine creator: "[T]he term 'religion' has reference to one's views of his relations to this Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[129] Religion imposes a duty higher than that to civil authority; the Religion Clauses of the First Amendment protect that duty—they protect freedom of conscience. "The first amendment to the constitution . . . was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience."[130]

The substantive legacy of *Davis*—its focus on duty to a higher power—would guide the Court as it struggled to decide what is and is not religion. In 1931, Chief Justice Charles Evans Hughes, dissenting in *United States v. Macintosh*, wrote that "[t]he essence of religion is belief in a relation to God involving duties superior to those arising from any other human relation."[131] In *Macintosh*, the Court upheld the denial of a petition for naturalization on the ground that the "petitioner would not promise in advance to bear arms in defense of the United States unless he believed the war to be morally justified."[132] But Hughes' reaffirmation of the priority of religious duty would deeply influence the thinking of the Court when it was confronted with moral objections to the Vietnam War; and, though the Court would move beyond the theistic orientation of *Davis*, in a very real sense it would stay true to its spirit.[133]

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[127] Davis v. Beason, 133 U.S. 333, 342 (1890).

[128] Madison, *supra* note 122.

[129] *Davis*, 133 U.S. at 342.

[130] *Id.*

[131] United States v. Macintosh, 283 U.S. 605, 633–34 (1921) (Hughes, J., dissenting).

[132] *Id.* at 614.

[133] The narrow confines of *Davis* were broadened by the Court in Torcaso v. Watkins, 367 U.S. 488 (1961).

In striking down a requirement that holders of public office declare their belief in the existence of God, the Court held that "neither a State nor the Federal Government can constitutionally . . . pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." *Id.* at 495. In other words, the Court acknowledged that religion does not mean theism. (Thus, as the Court noted, Buddhism and Taosim, among other systems of belief, qualify as religions for constitutional purposes. *Id.* at 495, n.11.) After Torcaso, "a belief in the existence of God" would no longer be relevant to the protections of the Establishment Clause. *Id.* at 495.

The most generous definition of religion given by the Supreme Court occurred in a series of decisions interpreting the Universal Military Training and Service Act (*See* United States v. Seeger, 380 U.S. 163 (1965), Welsh v. United States, 398 U.S. 333 (1970)). The statute adopted the theme of obligation (borrowing from Hughes's formulation in Macintosh) in granting conscientious objector status to persons who were opposed to war on the basis of "religious training and belief," which was defined as "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation . . . ." 50 U.S.C. App. § 456(j) (1958). In Seeger v. United States, the Court defined the question before it as one involving that theme: "Our question, therefore, is the narrow one: Does the term 'Supreme Being' as used in [the statute] mean the orthodox God or the broader concept of a power or being, or a faith, to which all else is subordinate or upon which all else is ultimately dependent?" 380 U.S. at 174. For the Seeger court, the fact that Congress used the expression "Supreme Being" rather than the designation "God" indicated that "religious training and belief" was meant "to embrace all religions," *id.* at 165:

> We believe that under this construction, the test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is 'in a relation to a Supreme Being' and the other is not.

Id. at 165–66. This "parallel position" definition of religion does not include views that are essentially political, sociological, or philosophical; and it is not synonymous with "a merely personal moral code." *Id.* at 173. The difference is a matter of conscience. "Within the phrase [religious training and belief] come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent." *Id.* at 176. In the context of conscientious objection, the Court found that there is a "duty to a moral power higher than the state" where a given belief, like a traditional religious belief, involves "duties superior to those arising from any other human relation." *Id.* at 171 (citing United States v. Mackintosh, 283 U.S. 605, 633 (1931) (Hughes, J., dissenting)).

The Seeger decision is commonly cited for its expansive definition of religion, and, in relying on the work of such modern theologians as Paul Tillich, it did expand the definition of God; in fact, the Court noted, almost as an afterthought, that "Seeger did not clearly demonstrate what his beliefs were with regard to the usual understanding of the term 'Supreme Being.' But as we have said Congress did not

To treat religious belief as a matter of choice—a matter of mere personal preference—"may miss the role that religion plays in the lives of those for whom the observance of religious duties is a constitutive end, essential to their good an indispensable for their identity."[134] That role leads Sandel to a reevaluation of the Court's modern free exercise jurisprudence, which he sees as illustrating "the connection between the voluntarist justification of neutrality and the liberal conception of the person."[135] Holding that "government should be neutral toward religion in order to respect persons as free and independent selves,"[136] modern free exercise law proffers a neutrality that does not show "strictly speaking, respect for religion, but respect for the self whose religion it is, or respect for the dignity that consists in the capacity to choose one's religion freely."[137] Neutrality, in other words, reflects a very different system of belief: a belief in the sacredness of the self unencumbered by convictions antecedent to choice.

This does not, as Sandel notes, serve religious liberty well: "It confuses the pursuit of preferences with the exercise of duties, and so forgets the special concern of religious liberty with the claims of conscientiously encumbered selves."[138] In fact, neutrality depreciates the religious claim. Confusing choice with conscience, the Court treats religion as life-style, one of many values the independent self may have; and this confusion "has led the Court to restrict religious practices it should permit, such as yarmulkes in the military, and also to permit practices it should probably restrict, such as nativity scenes in the public square. In different ways, both decisions fail to take religion seriously."[139]

The fate of the religiously encumbered self is especially troublesome in spiritual custody cases. Presumably, the parents are fighting for custody because of some religious imperative. To "split the difference" between their

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intend that to be the test." *Id.* at 171. For the traditional idea of God, the Court substituted Tillich's "God above God," the source of some affirmation of ultimate concern. *Id.* at 180.

But as its reliance on Hughes' opinion in Mackintosh suggests, the Seeger decision was quite orthodox when it proposed that what an objector believes is only relevant if that belief creates a crisis of conscience—that is, only if the belief involves a duty higher than that owed to the state. Seeger is, in this sense, a split decision: split between a broad, even radical, definition of religion from a content orientation, and a narrow, quite conservative definition from a functional perspective. While a belief or practice need not be analogous to traditional religion, its place in the heart of the believer must be. In the case of Seeger himself, the Court found that "the beliefs which prompted his objection occupy the same place in his life as the belief in a traditional deity holds in the lives of his friends, the Quakers." *Id.* at 187.

[134] SANDEL, *supra* note 25, at 67.

[135] *Id.* at 63.

[136] *Id.*

[137] *Id.* at 63–64.

[138] *Id.* at 71.

[139] *Id.*

equal free exercise claims—as though the custody hearing was to determine whether the child would play tennis or soccer—is to respect neither party. For the parents, the stakes (that is, the spiritual welfare of the child) are too high to be made the subject of bargaining and compromise. The "procedural virtues"[140]—tolerance, due process, respect for individual rights[141]—will not work here. They offer neither party satisfaction. Worse, if we take the religious claim seriously, splitting the spiritual difference may place the child in a psychologically precarious position—indeed, perhaps in a psychologically untenable position. The child remains unprotected from the violence of a domestic religious civil war—a kind of war, if on a less grand scale, familiar to the writers of the Constitution. Because the free exercise stakes are so high, because each parent has an equal claim to religious liberty, most courts take a hands-off approach to spiritual custody disputes, deferring to parental rights unless a parent's religious practices cause actual or substantial harm to the child.[142] There is a perverse illogic at work here. It is precisely because the stakes are so high and because the parents have equal claims to religious liberty that the neutral, rights-oriented posture of traditional liberalism is unable to settle the question.

The spiritual custody case is, in some ways, constitutionally unique, dealing as it does with the special obligations that accompany religious commitment. But for that very reason, it highlights the limitations of grand theories that focus either on procedural neutrality or a substantive vision of the good. And for that reason, it may also suggest a way to negotiate the conflicting demands of self and community by considering rights as emanating not from constitutional penumbras but from constitutionally privileged relationships—that is, from the concept that rights are a function of social relationship, the reward for choosing to give up (in no small measure) some of our choices.

IV. RELIGIOUS PARENTING AND THE CONSTITUTION

While we generally associate substantive due process with matters of great moral sensitivity and social volatility, the first appearance of non-economic substantive Fourteenth Amendment rights arose as the Court sought to protect a right that is less likely to be the subject of serious disagreement: the right to parent free from state interference. The holding of the *Meyer* and *Pierce* Courts—that the liberty of parents includes the right to direct the upbringing and education of their children[143]—is hardly controversial, but it is

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[140] AMITAI ETZIONI, THE NEW GOLDEN RULE xvi (1996).

[141] On the procedural virtues of minimalist liberalism, see SANDEL, *supra* note 25, at 3–54.

[142] *See* Zolla, *supra* note 6.

[143] *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 534–35.

worth noting that, during the first wave of substantive due process cases, the parenting right was understood by the Court to be part of a much broader universe of personal autonomy.[144] While the privacy rights protected by *Lochner* brought the Court to constitutional crisis and a jurisprudential dead-end, the autonomous self survived to fight another day. That self was conceived by the *Pierce* Court in traditionally liberal terms, its interests (its rights, rather) arrayed against those of the state. The child, the Court was quick to assert, "is not the mere creature of the state."[145] In *Pierce* and, again, in *Barnette*,[146] the Court upheld the right of "parents to give [their children] religious training and to encourage them in the practice of religious belief, as against preponderant sentiment and assertion of state power . . ."[147]

The right to determine a child's religious upbringing involves two aspects of personal freedom: the right to parent (protected by the Fourteenth Amendment) and the right to free exercise of religion (protected by the First and Fourteenth amendments). In *Prince v. Massachusetts*, the Court noted the special constitutional potency of this combination of rights:

> On one side is the obviously earnest claim for freedom of conscience and religious practice. With it is allied the parent's claim to authority in her own household and in the rearing of her children. The parent's conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters.[148]

But the *Prince* Court, observing that "neither rights of religion nor rights of parenthood are beyond limitation,"[149] held that child-labor legislation "is within the state's police power, whether against the parents claim to control of

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[144] *See Meyer*, 262 U.S. at 399 ("While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.").

[145] 268 U.S. at 535. *See also* 262 U.S. at 401–02 (citing Plato's "Ideal Commonwealth" and the example of ancient Sparta as efforts "to submerge the individual and develop ideal citizens"). In *Parham v. J.R.*, 442 U.S. 584, 603 (1979), the Court similarly rejected "[t]he statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children" as "repugnant to American tradition."

[146] West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[147] Prince v. Massachusetts, 321 U.S. 158, 165 (1944).

[148] *Id.* at 165.

[149] *Id.* at 166.

the child or one that religious scruples dictate contrary action."[150] Writing for the Court, Justice Wiley Rutledge argued that "[t]he state's authority over children's activities is broader than over like actions of adults."[151] That authority is premised on the idea that the state, too, has an interest in the child. "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers, within a broad range of selection."[152]

How distributing religious literature might endanger the well-rounded growth of young people may not be immediately clear, but the *Prince* Court was content to rely upon the "harmful possibilities . . . of emotional excitement and psychological or physical injury" that attend upon street preaching.[153] While "[p]arents may be free to become martyrs themselves," the Court insisted, "it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."[154]

This is a far cry from *Meyer* and *Pierce*. Though Rutledge restricted the Court's ruling to the facts presented in the case,[155] his is a post-Lochner vision of family privacy—"the family itself is not beyond regulation in the public interest . . ."[156] Despite the unique strength of a constitutional claim based on First Amendment and parenting rights, the Court asserted the power of the state to control the conduct of children, a power that reaches beyond the scope of its authority over adults.[157] The authority of the state is not nullified "merely because the parent grounds his claim to control the child's course of conduct on religion . . ."[158]

Prince stands for the proposition that the state has "a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction."[159] But as the memory of *Lochner* receded and a new chorus of substantive Fourteenth Amendment rights clamored for the Court's ear, the right of religious parenting was given greater deference. In *Yoder*, the Court called for the adoption a stricter level of scrutiny "when the interests of

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[150] *Id.* at 169.

[151] *Id.* at 168. For Rutledge, this was particularly true of public activities, including matters of employment.

[152] *Id.*

[153] *Id.* at 170.

[154] *Id.*

[155] *Id.* at 171.

[156] *Id.* at 166.

[157] *Id.* at 170.

[158] *Id.* at 166. (citing cases on mandatory school attendance, child labor laws, compulsory vaccination, and health and safety concerns).

[159] *Id.* at 167.

parenthood are combined with a free exercise claim . . . ."[160] Though the *Yoder* Court conceded that "the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens,"[161] the state would have to show more than merely a rational relation to some legitimate governmental purpose to sustain a regulation that burdened the free exercise of religion.[162] Unable to make a showing of particular harm,[163] the state failed to establish a compelling interest in requiring Amish children to attend school to age sixteen.

The *Yoder* decision affirmed *Pierce*.[164] Intent on confining the "sweeping potential for broad and unforeseeable application"[165] of *Prince*'s parens patriae claim, the Court relied on *Sherbert v. Verner*[166] to narrow the scope of governmental meddling with religious parenting. But several features of the decision limit its own potential.

For one thing, the *Yoder* Court, at times, identified the right of religious parenting as a hybrid right—that is, the conjunction of free exercise and parenting rights.[167] In *Employment Division, Department of Human Resources of Oregon v. Smith*, the Court would make much of this unique constitutional creature. In fact, as Justice Antonin Scalia maintained, the only decisions in which the Court "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"[168] (such as "a communicative activity or

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[160] 406 U.S. at 234.

[161] *Id.* at 233–34.

[162] *Id.* at 233.

[163] *See id.* at 234.

> [I]n this case, the Amish have introduced persuasive evidence undermining the arguments the State has advanced to support its claims in terms of the welfare of the child and society as a whole. The record strongly indicates that accommodating the religious objections of the Amish by forgoing one, or at most two, additional years of compulsory education will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society.

Id.

[164] *Id.* ("[t]he Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children").

[165] *Id.*

[166] 374 U.S. 398 (1963).

[167] 406 U.S. at 233 (noting that more than rational basis scrutiny is required "when the interests of parenthood are combined with a free exercise claim").

[168] Smith, 494 U.S. at 872.

parental right"[169]). Where a hybrid situation does not exist, the *Smith* Court held that "the right of free exercise does not relieve the individual of the obligation to comply with a 'valid and natural law of general applicability on the ground that the proscribes or prescribes) conduct that his religion prescribes (or proscribes).'"[170] There is no private free exercise right to ignore the laws of the community: "The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'"[171] Returning to the language of *Reynolds v. United States*, Scalia warned that "[t]o make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, 'to become a law unto himself'—contradicts both constitutional tradition and common sense."[172]

What peculiar constitutional value, then, is there in the conjunction of free exercise and parenting that entitles it to a more searching inquiry than that applied to a generally applicable law that burdens free exercise alone? *Smith* does not provide an answer (and the hybrid distinction may be mostly a matter of strategic consideration), but the Court' s reasoning in *Yoder* serves as an interesting gloss on the nature of the Free Exercise-parenting hybrid right.

Yoder is an odd decision. Much of the opinion rests on the special characteristics of the Amish community. Though the Court suggests that accommodating the religious objections of the Amish "reflects nothing more than the governmental obligation of neutrality in the face of religious differences,"[173] Chief Justice Warren Burger writes at length about the unique features of the Amish that reduce the compellingness of the state's interests. Neutrality seems cast aside when he notes that "few other religious groups or sects"[174] could make such a "convincing showing"[175] that governmental intrusion was unwarranted. That showing was based on, among other things, the fact that the Amish had "demonstrat[ed] the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State relies in support of its program of compulsory high school education."[176] In other words, the whole of the Amish world—though a world "separate, sharply identifiable and highly self-sufficient"[177]—is

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[169] *Id.* at 882.

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

[171] *Id.* at 885 (quoting Lyng v. N.W. Indian Cemetery Protective Ass'n., 485 U.S. 439, 451 (1988)).

[172] *Id.* at 885 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)).

[173] *Yoder*, 406 U.S. at 235, n.22.

[174] *Id.* at 236.

[175] *Id.*

[176] *Id.* at 206.

[177] *Id.* at 225.

a viable alternative to mandatory education as a vehicle for the generation and transmission of civic virtues. There is "strong evidence," the Court observed, "that [the Amish] are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eight grade. . . ."[178] The Amish people have no inherent right to be free from mandatory schooling. Like parents who send their children to parochial schools, they have created—they have, in effect, earned—such a privacy right by establishing a type of affiliative social structure comparable to more traditional civic institutions, a structure that effectively promotes the same values underlying the requirement of compulsory education.

The right that is recognized in *Yoder* is not an individual right. It belongs to the Amish community: it only exists because a certain kind of community exists. To the extent that individuals enjoy the right not to go to school, they do so only as members of that community, not as individuals qua individuals. If an Amish family were to move away from the "highly successful"[179] social structures that have sustained the community for 300 years, the privacy right would be left behind. Its hybrid nature means that its existence is contingent on the community that calls it into existence. Here, too, a constitutional right inheres in the implicit constitutional call for relationships of interdependent obligation.

That privacy right is also dependent on religious belief. The *Yoder* Court, true to the spirit of Jefferson and Madison, made it clear that non-religious communities would not call such a right into existence: "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief."[180] To make the Amish send their children to school is to require them to violate "not merely a matter of personal preference, but one of deep religious conviction."[181]

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[178] *Id.*

[179] *Id.* at 222.

[180] *Id.* at 215.

[181] *Id.* at 215–16.

> [T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

Id.

Taken together, *Yoder* and *Smith* may help us navigate the murky waters of spiritual custody cases.[182] When two people agree to work together to provide for the welfare of a child, their community of interests calls into existence a privacy right. The state allows them the freedom to impose their beliefs on an unformed conscience, a truly remarkable privilege and one capable of great abuse. However, to assume the welfare of a child is an equally remarkable duty, and we accordingly defer to parents who undertake the great social responsibility of raising children. But spiritual custody cases result from the disruption of the family community, from a contest of parental wills that has been brought to the court for public adjudication. The free exercise right is no longer attached to the parenting entity that enjoys, under *Smith*, a special constitutional status. Instead, more properly belonging to each parent as a separate unit, the right should no longer convey the privilege to determine the spiritual education of the child.

V. REVISITING THE SPIRITUAL CUSTODY CASE

In rejecting a consideration of religious factors as part of the "best interests" analysis, the *Zummo* court raised both free exercise and Establishment Clause concerns. Its First Amendment analysis is flawed on both counts. The court's free exercise analysis confuses the right of the parent to exercise his or her religion with the right of the parent to expose a child to his or her religious beliefs. The court rests its argument on *Yoder*, but, as I have tried to suggest, *Yoder* assumes a viable affiliative structure that can do the work of social ordering. In the child custody case, no such structure exists—indeed, the child has been placed at the center of a contest of parental wills, each parent laying claim to an equal share of the child's conscience. Basing its decision on a foundation of religious liberty, the court ignores the special constitutional standing of religious liberty claims. Simply put, splitting the religious difference fails to protect the free exercise claim of either parent and provides for the child a ready opportunity for a crisis of conscience. In such a situation, affirming a private free exercise right of religious parenting is pointless. The right has been surrendered by virtue of the dissolution of the marriage.

This was, in fact, the conclusion reached by the Pennsylvania Superior Court in the earlier case of *Morris v. Morris*.[183] In *Morris*, the court upheld restrictions on a father's visitation rights against his claim of free exercise. Noting that case law stood for the proposition that only "interests of the highest order"[184] might permit the state "to pierce the cloak of the familial unit,"[185] the

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[182] *But see* Dobrac, *supra* note 7, at 1617–20 (stating that "[t]he *Smith* decision fails to provide clear guidance for child custody cases").

[183] 412 A.2d 139 (Pa. Super. Ct. 1979).

[184] *Id.* at 143.

[185] *Id.*

court reasoned that a standard resembling strict scrutiny was only applicable when the state was "attempting to intrude on a unified, nuclear family."[186] In matters of custody, the court observed, "the family unit has been dissolved, and that dissolution is accompanied by a weakening of the shield constructed against state interference."[187] As a consequence, the court found that a consideration of religious beliefs, while it could not constitute the sole determinant in a child custody award, was a proper part of the judicial inquiry.[188] "The very concept of 'best interests,'" the court noted, "would be but a hollow shibboleth were not parental rights to yield to the welfare of the child."[189]

In rejecting *Morris*, the superior court also confused concern with the child's psychological and emotional well-being due to a stable home environment (stability in spiritual education) with the rightness or wrongness of religious beliefs. But, as the *Morris* court, the two inquiries need not be conflated: "we neither intend to, nor are capable of, rendering a value judgment on the intrinsic truth of the varied religious beliefs [of the parents], but confine our investigation solely to any detrimental effect their practice may have on the development of the child."[190] Nor did the lower court in *Zummo* undermine any constitutional walls between church and state. The dissent from the superior court's opinion correctly observed that the trial judge "did not impermissibly evaluate the relative merits of the two religions.[191] Rather, the court "weighed Husband's and Wife's concerns about Husband's obligations during his periods of physical custody and designed a compromise set forth in the [custody] order."[192]

There is no constitutional reason why the interests of the child should not prevail in spiritual custody cases. The "best interests" standard is a far-from-perfect method of adjudicating family conflict,[193] but it does not become less problematic by keeping religion out of the courtroom. The religious factors considered by the *Morris* court are both constitutionally permissible and, from the child's point of view, psychologically indispensable.

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[186] *Id.*

[187] *Id.* ("A parent cannot flaunt the banner of religious freedom and familial sanctity when he himself has abrogated that unity.") *See also* Michael H. v. Gerald D., 491 U.S. 110, 131 (1989) ("When the husband or wife contests the legitimacy of their child, the stability of the marriage has already been shaken.")

[188] *Id.*

[189] *Id.* at 144.

[190] *Id.*

[191] Zummo v. Zummo, 574 A.2d 1130, 1160 (Pa. Super. Ct. 1990).

[192] *Id.*

[193] For criticism of the "best interests" standard, see Barbara Bennett Woodhouse, *Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard*, 33 FAM. L.Q. 815, 820–22 (1999); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1 (1987).

The fact-sensitive nature of the "best interests" standard is true to the idea of the family as a sphere of interdependent obligation. The family teaches not autonomy, but obligation; not self, but service. The family teaches a principle that makes both psychological and constitutional sense: that personal identity is a function of relationship. Commitment to relationship—say, by assuming the status of spouse or parent—is a value embedded in the constitutional order.[194] That commitment creates a special status, with concomitant rewards and duties. Treating the privacy right as contingent on a commitment to the private work of social ordering "rescue[s] what seem[s] valuable in a world of mutual obligation while still pursuing the protections of rights against coercive power."[195] The notion that rights are called into existence by the work of social ordering addresses the claims of both self and community—and maintains the fragile dialectic at the heart of our constitutional order.

VI. CONCLUSION

It may have been in the best interests of the Zummo children to be exposed to "contrary" religious traditions. But when the Pennsylvania Superior Court grounded that decision on the "constitutional prerequisite of 'benign neutrality' toward *both* parents' religious viewpoints,"[196] it chose not to consider factors that would be highly relevant to the custody determination. The court was not constitutionally obligated to do so.

This analysis of the spiritual custody case has attempted to re-locate the source of religious parenting rights. The spiritual custody court should "focus on the context of relationships rather than on isolated rights. . . ."[197] That focus need not involve some grand theory of the common good (accompanied by some narrow idea of the norm in familial arrangements). Rather, it ought to look toward a relationship of caring, toward commitments of interdependent obligation.[198] It ought to honor the choice that people make to give up choice in

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[194] *See* McClain, *supra* note 106; Josephson, *supra* note 102, at 17–19.

[195] MINOW, *supra* note 10, at 268.

[196] Zummo v. Zummo, 574 A.2d at 1157.

[197] REGAN, *supra* note 16, at 135.

[198] I have argued that the right of religious parenting should be construed as relational in purpose and scope. The right is a function of the relationship that calls it into existence. It is not my contention that every constitutional right should be so construed. But I do believe that such an approach allows for the expansion of rights beyond the narrow confines of the autonomous self and a rights jurisprudence built on a platform of individual privacy. Thinking about rights as relational might well be a productive way to address privacy concerns in the context of constitutionally problematic affiliative relationships. The right to homosexual marriage has been defended both in terms of privacy and more substantive ideas of the public good. There are difficulties with both approaches. Privacy rights may fail to extend to state-sanctioned marriage. Value-based approaches to marital rights may expect homosexual relationships to pass a kind of moral litmus test not required of straight couples. What

is required from a relational rights point of view is participation in the work of social ordering that married couples do and government neutrality toward the gender of the participants who do that work. Marital rights should inhere in the relationship that marriage honors and promotes.

It was in that relationship that the Court at first situated the right to marital sexual privacy. The right recognized in *Griswold v. Connecticut* was one "surrounding the marriage relationship." 381 U.S. 479, 486 (1965). The right to use contraception was the right to use it in "the sacred precincts of marital bedrooms." *Id.* at 485. Of course, the right to use contraception was soon established as a right of individual privacy, but not without cost to a truly robust rights jurisprudence. Seeking to extend contraceptive rights to unmarried persons, the Court turned aside from the route of relational rights to pursue a more individualistic reading of privacy rights. Writing for the Court in *Eisenstadt v. Baird*, Justice William Brennan unwound rights from relationship:

> It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and a heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

405 U.S. 438, 453 (1972). In Brennan's formulation, the marital relationship no longer conveys special constitutional privilege. Nor, from his point of view, should it. For the relationship is no longer what it was, an entity with a mind and a heart of its own.

One year before *Roe v. Wade*, 410 U.S. 113 (1973), the Court found itself at a critical juncture in the jurisprudence of personal freedom. The Court was faced with two different ways of thinking about intimate relationships and the rights accorded them—and two languages to describe those relationships and rights. In *Griswold*, the Court described marriage as "a coming together, for better or worse, hopefully enduring, intimate to the degree of being sacred." 381 U.S. at 486. The language reminds us of marriage vows and the obligations they impose. For Douglas, marriage is about dependence, about choosing to give up choice. It is a relationship (here, Douglas descends to the prosaic) based on "bilateral loyalty." *Id.* Put another way, marriage is about status—first the psychological and emotional commitment of the married couple; second, the special rights accorded those who make that commitment. For Brennan, however, marriage is about associational voluntarism. It is about choice, and the privacy that must accompany personal preferences.

The course of individual privacy was enormously rights enhancing (most notably, in the arena of reproductive freedom), but it did not need to come at the expense of a relational approach to fundamental rights. The moral aspiration voiced in *Griswold* is not "heterosexual intimacy per se, but the more general vision of responsibility based on the cultivation of a relational sense of identity." REGAN, *supra* note 16, at 120. From a relational rights point of view, the foundation of marital privacy rights is participation in the work of social ordering that married couples do. Where two people are willing to care for each other in the community of interdependent obligation that

the interest of forming communities of interdependent obligation, small and large. It is just such a fact-sensitive inquiry that is required by the "best interests of the child" standard.

In the most famous literary account of a custody case, it takes the wisdom of Solomon to decide who is the appropriate parent. Most readers, I would imagine, assume that Solomon has figured out the identity of the child's biological mother, the point of the story being that the "real" mother of the baby would not stand by and see it hurt. But there is nothing in the story to indicate that it is the biological mother who speaks out. Perhaps the wisdom of Solomon lies in discerning that the "real" mother is the one who attends to the child's needs, willingly sacrificing her own. Perhaps, like Solomon, today's courts can help us envision a constitutional model of parenting that balances the rights of the parent with the relational needs of the child, and a constitutional model of rights that rewards those working to fulfill a vision of ordered liberty.

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marriage prescribes, the substantive ends of marriage are met. Beyond that, government can and should remain neutral as to a vision of the good family life.

This was the approach taken by the Massachusetts Supreme Court in striking down state restrictions on same-sex marriage. *See* Goodridge v Dept of Public Health, 798 N.E. 2d 941 (Mass. 2003). The court, as would be expected, framed the constitutional question as one involving liberty and equality. *See id.* at 953. But the holding of the court is based on the foundation that marriage is a relationship created and regulated by the state because of the social work that it does. Civil marriage "anchors an ordered society," *id.* at 954, by "encouraging stable relationships over transient ones," *id.*, by ensuring that adults and children are cared for, *id.* The stability this "vital social institution," *id.* at 948, brings to our society—a stability that is "central to . . . the welfare of the community," *id.* at 954—rests upon "the exclusive commitment of two individuals to each other," a commitment that "nurtures love and mutual support," *id.* at 948. Limiting the benefits and obligations of marriage to opposite-sex couples diminishes the value of this "vital organizing principle of our society," *id.* at 969, and undermines the fundamental constitutional commitment to a private world of social ordering.