

Day of Reckoning: On Non-Custodial Parents' Rights to Teach Their Children Religion

by
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I. Introduction

The U.S. Supreme Court has long recognized that the Constitution protects the right of parents to impart religious values to their children. However, the Court has never addressed the Constitution's limitations on the states with respect to how those states resolve divorced parents' disputes about their children's religious training. State courts have adopted various approaches when seeking to balance the parent's respective rights and their children's interests. But many state approaches do not take adequate account of existing Religion Clause guarantees and are unlikely to pass muster under the current Court's increasingly robust view of free exercise protections. The Court's ever-evolving understanding of the depth and breadth of those guarantees is likely to play havoc in the context of court attempts to limit the rights of parents to impart their religious views to their children, and state courts would be wise to modify their approaches before they are inundated with cases.

Part II of this article discusses the constitutional protection of the right to instruct one's child in religious matters, concluding that this fundamental right is likely to be given increasingly robust protection by the Court. Part III discusses several state cases in which courts have tried to balance the constitutional interests of the parents and the welfare interests of their children, noting that some of these decisions would likely have been reversed had they come before the current Court. The article concludes that many states will likely have to modify their approaches with respect to the conditions under which noncustodial parents may be

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prohibited from instructing their children on religious matters, best interests of the children notwithstanding.

II. The Parent's Right to Engage in Religious Instruction

The Court has long made clear that the Constitution protects the right of parents to educate their children in various matters including religion. That right is not unqualified and the Court has spelled out some limitations, although much remains unclear. Further, the Court has not come close to addressing the appropriate framework for addressing the respective parent's rights to instruct in religious matters when the parents' views are in conflict, although the Court has issued hints about its view. Each parent's right to educate his or her child on religious matters is likely viewed by the Court as much stronger than many seem to appreciate.

A. *Early Cases*

About a century ago, the U.S. Supreme Court addressed the right of parents to direct the education of their children. Initially, the Court did not focus on the right to educate in religious matters, although that issue in particular was addressed soon thereafter. The Court made clear that the parent's right to educate his or her children on religious matters had constitutional protection, although the Court left many questions unanswered when addressing the contours of that right.

In *Meyer v. Nebraska*,¹ the Court examined the constitutionality of a Nebraska law prohibiting anyone from teaching a live language other than English to a child who had not yet passed eighth grade. Robert Meyer, who worked in a parochial school and had been teaching German through the use of Bible stories,² was convicted of teaching that language to a ten-year-old who

¹ 262 U.S. 390 (1923).

² *Id.* at 397 (“[T]he offense charged and established was ‘the direct and intentional teaching of the German language as a distinct subject to a child who had not passed the eighth grade,’ in the parochial school maintained by Zion Evangelical Lutheran Congregation, a collection of Biblical stories being used therefore.”) (quoting *Meyer v. State*, 187 N.W. 100, 102 (Neb. 1922), *rev'd*, 262 U.S. 390 (1923)).

had not yet attained the requisite level of educational achievement.³

When analyzing whether the Nebraska prohibition passed constitutional muster, the *Meyer* Court suggested that “education and acquisition of knowledge . . . [are] matters of supreme importance which should be diligently promoted,”⁴ and observed that “it is the natural duty of the parent to give his children education suitable to their station in life.”⁵ But the question at hand was whether Nebraska had the power to preclude children from acquiring certain knowledge before they had a sufficient grounding in other matters.⁶

The *Meyer* Court cited to the Ordinance of 1787 for the proposition that “Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”⁷ Regretta-

³ *Id.* at 396–97 (“[O]n May 25, 1920, while an instructor in Zion Parochial School he unlawfully taught the subject of reading in the German language to Raymond Parpart, a child of 10 years, who had not attained and successfully passed the eighth grade.”).

⁴ *Id.* at 400.

⁵ *Id.*

⁶ *See id.* at 397–98. The following excerpts from the opinion sufficiently indicate the reasons advanced to support the conclusion:

The salutary purpose of the statute is clear. The Legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country. The statute, therefore, was intended not only to require that the education of all children be conducted in the English language, but that, until they had grown into that language and until it had become a part of them, they should not in the schools be taught any other language. The obvious purpose of this statute was that the English language should be and become the mother tongue of all children reared in this state.

(quoting *Meyer v. State*, 187 N.W. 100, 102 (Neb. 1922), *rev'd*, 262 U.S. 390 (1923)).

⁷ *Meyer*, 262 U.S. at 400.

bly, the Court did not explain why that passage in particular was quoted. Nebraska was encouraging a certain kind of education—it is not as if Nebraska meant to *discourage* education. While the law privileged certain kinds of knowledge over other kinds (at least with respect to when they would be acquired), there is nothing unusual in that, and one would not expect the Court to strike down a law because the Court and the state differed about the pedagogical cost-benefit calculation regarding when foreign languages should be taught.⁸ Further, if this were a disagreement about what should be taught at which times in order to promote secular ends,⁹ the Court might have been expected to shorten the quotation when citing to the Northwest Ordinance language—by beginning with the word “Knowledge” and not including the words “Religion and morality” at the beginning of the quotation, so there would be less reason to fear that the Court’s meaning or focus might be misconstrued.

A closer examination of the Nebraska Supreme Court opinion that the U.S. Supreme Court was reviewing¹⁰ suggests some of the issues that the Court was likely considering *sub silentio*—the Court’s including the words “Religion and morality” was likely not by mere happenstance. While the Court did not discuss religious training expressly, the Court may have been worried about the implications of the Nebraska opinion for religious education.¹¹

⁸ See *id.* at 401 (“[T]he purpose of the legislation was to . . . inhibit[] training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals.”) But see *id.* at 403 (“It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child.”). Cf. Louise Weinberg, *The McReynolds Mystery Solved*, 89 DENV. U. L. REV. 133, 144 (2011) (“Like Nebraska in the *Meyer* case, many states still postpone the study of modern foreign languages until the high-school years, at least in public schools.”).

⁹ *Meyer*, 262 U.S. at 401 (“[T]he purpose of the legislation was to promote civic development.”).

¹⁰ *Meyer v. State*, 187 N.W. 100 (Neb. 1922), *rev’d*, 262 U.S. 390 (1923).

¹¹ William G. Ross, *The Contemporary Significance of Meyer and Pierce for Parental Rights Issues Involving Education*, 34 AKRON L. REV. 177, 196 (2000) (“Even though *Meyer* and *Pierce* did not directly address the free exercise implications of these cases, the laws that the Court nullified in those decisions interfered with the freedom of parents to provide a religious education for

When analyzing the Nebraska law's application to the facts, the state supreme court explained that the textbook used Bible stories and was written in German.¹² But prosecuting someone for how he teaches the Bible in a parochial school class is fraught with potential constitutional difficulties.¹³ Indeed, the defendant had claimed that "in teaching the German language in this book he was giving religious instruction according to the faith of the Zion Evangelical Lutheran Congregation."¹⁴

The Nebraska court reasoned that two different subjects were being taught—the German language and religion¹⁵ But "[i]f the law prohibited the teaching of the German language as a separate and distinct subject, then . . . the fact that such language was taught from a book containing religious matter could not act as a shield to the defendant."¹⁶ Basically, the state supreme court suggested that choice of a text containing religious material would not alone immunize the instruction from further review.

It was not as if this book was picked randomly or that there was no religious benefit to learning German. "It is true that in familiarizing the children with the German language they would become better able to fully understand the services of the church

their children."). See also Weinberg, *supra* note 8, at 148 (suggesting that *Meyer* was decided "partly for religious reasons").

¹² *Meyer*, 187 N.W. at 101.

¹³ There is some question whether *Meyer* was teaching during a class period rather than during recess. See Jesse H. Choper & Stephen F. Ross, *The Political Process, Equal Protection, and Substantive Due Process*, 20 U. PA. J. CONST. L. 983, 1030 (2018) ("In *Meyer v. Nebraska*, the Court reversed the conviction of a private school teacher for teaching (during recess) reading in the German language, in violation of a state law outlawing instruction in other languages before ninth grade."); Paula Abrams, *The Little Red Schoolhouse: Pierce, State Monopoly of Education and the Politics of Intolerance*, 20 CONST. COMMENT. 61, 74 (2003) ("Robert Meyer, a private school teacher, was convicted of teaching German during recess."). But see David M. Smolin, *Will International Human Rights Be Used as a Tool of Cultural Genocide? The Interaction of Human Rights Norms, Religion, Culture and Gender*, 12 J.L. & RELIGION 143, 156 (1996) ("In this context, it is useful to remember why Mr. Meyer's German lesson occurred at 'recess.' When the State of Nebraska prohibited the teaching of German prior to the eighth grade, the Lutheran school, in reliance on a state supreme court holding, attempted to bypass the reach of the prohibition through rescheduling language classes to a recess period.").

¹⁴ *Meyer*, 187 N.W. at 101.

¹⁵ *Id.*

¹⁶ *Id.*

when conducted in German.”¹⁷ The Nebraska court rejected that making the children more familiar with German would have special religious benefit—“so far as teaching the particular religious beliefs of the church to the children in the school was concerned, such religious teaching could, manifestly, be as fully and adequately done in the English as in the German language.”¹⁸ Yet, one would not expect a court (rather than religious authorities) to decide whether there was any religious benefit to conducting services in one language rather than another, and commentators suggest that the English-only laws for those who had not yet passed the eighth grade may have been adopted to weaken certain cultural and religious connections.¹⁹

The Nebraska Supreme Court made clear that it was not addressing “the right to hold devotional exercises in the German language, regardless of what the pupils might incidentally attain in learning and familiarity with that language while in attendance upon such exercises.”²⁰ Instead, the court was addressing “the direct and intentional teaching of the German language as a distinct subject.”²¹ Yet, one might directly and intentionally teach children German, precisely because doing so would make certain religious activities conducted in German more meaningful, especially if the children’s parents’ command of English was not very good.²² When discussing “Religion, morality and knowledge”²³ and affirming the right to parents to direct their children’s education,²⁴ the *Meyer* Court may well have been incorporating the parents’ right to direct their children’s religious education *sub*

¹⁷ *Id.* at 101–02.

¹⁸ *Id.* at 102.

¹⁹ See, e.g., Paul Finkelman, *William G. Ross, Forging New Freedoms: Nativism, Education, and the Constitution, 1917-1927*. Lincoln: University of Nebraska Press, 1994. Pp.x + 277, 45 J. LEGAL EDUC. 291, 292 (1995) (“In reality, however, supporters of the laws wanted to undermine cultural ties—and in some cases religious ties—between the Old World and the United States.”).

²⁰ *Meyer*, 187 N.W. at 102.

²¹ *Id.*

²² See *id.* (“A thorough knowledge of the German language as would be gained by young children by a course of study in the schools would no doubt, as pointed out in the testimony, make more convenient the matter of religious worship with their parents, whose knowledge of English was limited.”).

²³ *Meyer*, 262 U.S. at 400.

²⁴ *Id.*

silentio.²⁵ The Court addressed that right more explicitly in subsequent cases.²⁶

In *Meyer*, the Court established the right of parents to direct the education of their children. But the Court also suggested that the state had broad powers with respect to its power to regulate education. For example, the state had the power “to compel attendance at some school and to make reasonable regulations for all schools,”²⁷ although the Court did not address whether the Constitution imposed any limitations on the state power to preclude attendance at certain schools. That issue was raised in a subsequent case.²⁸

In *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, the Court examined the constitutionality of an Oregon law requiring students between the ages of 8-16 to receive their educations in public schools.²⁹ The law was challenged by a military academy³⁰ and by a parochial school.³¹

The *Pierce* Court denied that the state had the power to “standardize its children by forcing them to accept instruction

²⁵ Cf. *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (“The duty to prepare the child for ‘additional obligations, referred to by the Court, must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship.’”).

²⁶ See *infra* notes 29-79 and accompanying text (discussing *Pierce*, *Prince*, and *Yoder*).

²⁷ *Meyer*, 262 U.S. at 402.

²⁸ See *infra* notes 29-36 and accompanying text (discussing *Pierce*)

²⁹ *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 530 (1925) (“The challenged act . . . requires every parent, guardian, or other person having control or charge or custody of a child between 8 and 16 years to send him ‘to a public school for the period of time a public school shall be held during the current year’ in the district where the child resides.”).

³⁰ *Id.* at 532–33 (“Appellee Hill Military Academy is a private corporation organized in 1908 under the laws of Oregon, engaged in owning, operating, and conducting for profit an elementary, college preparatory, and military training school for boys between the ages of 5 and 21 years.”).

³¹ *Id.* at 531–32.

Appellee the Society of Sisters is an Oregon corporation . . . with power to . . . educate and instruct the youth. . . . In its primary schools many children between those ages [8-16] are taught the subjects usually pursued in Oregon public schools during the first eight years. Systematic religious instruction and moral training according to the tenets of the Roman Catholic Church are also regularly provided.

Id. at 531.

from public teachers only.”³² In a passage requiring further unpacking, the Court commented, “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.”³³

The Court did not specify which additional obligations it had in mind, although the Court is presumably referring to obligations that are not state-imposed, which may be why the Court is pointing out that the child is “not the mere creature of the state.” These non-state-imposed obligations for which the parents would have both the right and duty to prepare the child would presumably include *non-secular* obligations. Here, the Court may well have been suggesting that parents have the right and duty to provide their children religious instruction.

The *Pierce* Court, like the *Meyer* Court, affirmed that the state has broad powers over education.

No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.³⁴

Nonetheless, the Court reasoned that *Meyer* controlled the outcome of the case and required the invalidation of the law at issue. “Under the doctrine of *Meyer v. Nebraska*, . . . we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”³⁵ *Pierce* has come to

³² *Id.* at 535. The Court made a related point in *Meyer*. *Meyer*, 262 U.S. at 402 (“The desire of the Legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate.”). The *Meyer* Court suggested that the proposed method of achieving that goal exceeded permissible bounds. *Id.* at 402 (“But the means adopted, we think, exceed the limitations upon the power of the state and conflict with rights assured to plaintiff in error.”).

³³ *Pierce*, 268 U.S. at 535.

³⁴ *Id.* at 534.

³⁵ *Id.* at 534–35.

be recognized as protecting the parent's right to afford his or her child religious and secular education.³⁶

B. *Mixed Signals in the Developing Jurisprudence*

Meyer and *Pierce* established the parent's right to educate his or her child, but left open how great a burden the state would have to bear to justify overriding that right. The Court's subsequent jurisprudence is open to multiple interpretations, at least in part because the Court has sent mixed messages with respect to how important the implicated state interest must be to justify imposing limitations on religious practices.

In *Prince v. Massachusetts*³⁷ the Court made clear that the parent's right to direct the religious education of his or her child, while not without limit, must be taken quite seriously. "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."³⁸

At issue in *Prince* was Sarah Prince's conviction under Massachusetts child labor laws for permitting her child³⁹ to hand out

³⁶ See *Prince v. Massachusetts*, 321 U.S. 158, 165–66 (1944) ("[I]n *Pierce v. Society of Sisters*, 268 U.S. 510, this Court had sustained the parent's authority to provide religious with secular schooling, and the child's right to receive it, as against the state's requirement of attendance at public schools."). See also Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 1055–56 (2013) (discussing "the Supreme Court's affirmation in *Pierce v. Society of Sisters* that families have a constitutional right to educate their children according to their own religious beliefs"); Alan M. Hurst, *The Very Old New Separationism*, 2015 B.Y.U. L. REV. 1, 29 n.131 ("[P]arents' religious education of their children . . . had already received protection in *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925)."); Norman B. Smith, *Constitutional Rights of Students, Their Families, and Teachers in the Public Schools*, 10 CAMPBELL L. REV. 353, 408 (1988) ("Religious free exercise claims of those who wish to withdraw from public education into private or parochial schools or home education are fully protected under *Pierce v. Society of Sisters*.").

³⁷ 321 U.S. 158 (1944).

³⁸ *Id.* at 165.

³⁹ Sarah "was the aunt and custodian of Betty M. Simmons, a girl nine years of age." See *id.* at 159.

religious magazines in exchange for donations.⁴⁰ The Supreme Judicial Court of Massachusetts had held that the Massachusetts law was applicable to the circumstances at issue⁴¹ and that application of the laws to that conduct did not violate constitutional guarantees.⁴²

The *Prince* Court recognized that important constitutional rights were implicated, including the child's right to religious exercise and the parent's right to give the child religious training⁴³ Important interests had to be balanced. "On one side is the obviously earnest claim for freedom of conscience and religious practice [which was] . . . allied [with] the parent's claim to authority in her own household and in the rearing of her children."⁴⁴ On the other side stood the societal interest in protecting children."⁴⁵ The state interest included protecting the child from abuse and giving the child the opportunity to grow into a free and independent citizen.⁴⁶

When performing the requisite balancing, the Court noted, "It is cardinal with us that 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."⁴⁷ But, the Court cautioned, the family may be regulated in appropriate circumstances, religious claims notwithstanding.⁴⁸

When balancing religious liberties with the child's interests, the Court assessed the degree to which the child's welfare was

⁴⁰ *Id.* ("Sarah Prince appeals from convictions for violating Massachusetts' child labor laws, by acts said to be a rightful exercise of her religious convictions.").

⁴¹ *Com. v. Prince*, 46 N.E.2d 755, 757 (Mass. 1943), *aff'd sub nom. Prince v. Massachusetts*, 321 U.S. 158 (1944) ("And, finally, we cannot say that the evils at which the statutes were directed attendant upon the selling by children of newspapers, magazines, periodicals, and other merchandise in streets and public places do not exist where the publications are of a religious nature.").

⁴² *Id.* at 758 ("We are of opinion that these statutes as here construed do not infringe upon the constitutional guaranties of freedom of the press and of religion.").

⁴³ *Prince*, 321 U.S. at 165.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 166 (citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

⁴⁸ *Id.*

endangered by engaging in the prohibited activity. Prince had argued that Betty's presence on the street with Prince nearby was either not harmful or, at any rate, no more harmful than many other practices in which children are permitted to engage.⁴⁹ But the Court was unconvinced, because child labor was known to have many deleterious effects.⁵⁰ The Court concluded, "It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power, whether against the parents claim to control of the child or one that religious scruples dictate contrary action."⁵¹

One reason that the implications of *Prince* are open-ended is that a lot depends upon the degree of danger posed by Betty Simmons engaging in the proscribed activities.⁵² The Court noted that "propagandizing the community . . . may and at times does create situations difficult enough for adults to cope with and wholly inappropriate for children, especially of tender years, to face."⁵³ In addition, such activities might result in other physical or psychological harms.⁵⁴

If indeed Betty was in great danger, then it is unsurprising that the Court upheld the constitutionality of the State preventing the conduct at issue.⁵⁵ But absent a showing of great danger, the Court would not be affording the implicated rights much protection,⁵⁶ and the State would seem permitted to override relig-

⁴⁹ *Prince*, 321 U.S. at 167.

⁵⁰ *Id.* at 168.

⁵¹ *Id.* at 168–69.

⁵² Betsy was Prince's niece. *See supra* note 39.

⁵³ *Prince*, 321 U.S. at 169–70.

⁵⁴ *Id.* at 170.

⁵⁵ *Cf.* *Wisconsin v. Yoder*, 406 U.S. 205, 229–30 (1972) (noting "the Court's severe characterization of the evils that it thought the legislature could legitimately associate with child labor, even when performed in the company of an adult") (citing *Prince*, 321 U.S. at 169–70).

⁵⁶ *See Prince*, 321 U.S. at 174 (Murphy, J., dissenting) ("If the right of a child to practice its religion in that manner is to be forbidden by constitutional means, there must be convincing proof that such a practice constitutes a grave and immediate danger to the state or to the health, morals or welfare of the child.") (citing *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639 (1843)).

ious rights by simply claiming that doing so would somehow promote the child's interest or public welfare.⁵⁷

It is not as if Sarah Prince left Betty alone to fend for herself. Rather, Sarah was nearby,⁵⁸ which presumably mitigated some of the dangers to which Betty might be exposed. If the mere possibility of psychological injury resulting from people saying mean things to Betty justifies the state intervention, then the State would seem to have great flexibility in limiting free exercise to promote child welfare.

Yet, the opposite conclusion might be drawn from *Wisconsin v. Yoder*.⁵⁹ At issue in *Yoder* was a Wisconsin law requiring school attendance until children reached age 16.⁶⁰ Some Amish parents refused to send their children (aged 14 or 15 respectively) to school out of a fear that doing so would undermine the children's values⁶¹ and jeopardize all of their lives in the hereafter.⁶²

The *Yoder* Court explained that in order for Wisconsin to be justified in requiring school attendance past the eighth grade in contravention of sincere religious belief, the state had to have "a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."⁶³ The Court then set about assessing the importance of the state's implicated interest.

⁵⁷ *Id.* at 177 (Jackson, J., concurring in the result) ("[A] foundation is laid for any state intervention in the indoctrination and participation of children in religion, provided it is done in the name of their health or welfare.").

⁵⁸ *Id.* at 162 ("Betty . . . and Mrs. Prince took positions about twenty feet apart near a street intersection.").

⁵⁹ 406 U.S. 205 (1972).

⁶⁰ *Id.* at 207 ("Wisconsin's compulsory school-attendance law required them to cause their children to attend public or private school until reaching age 16.").

⁶¹ *Id.* at 210–11 (The Amish "object to . . . higher education generally because the values they teach are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a 'wordly' influence in conflict with their beliefs.").

⁶² *Id.* at 209 ("They believed that by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but, as found by the county court, also endanger their own salvation and that of their children.").

⁶³ *Id.* at 214.

The Court began its analysis by explaining that providing public education is a very important state function.⁶⁴ But the Court immediately put that statement in context by noting that the parent's role in directing the religious education of his or her children is also very important.⁶⁵ The State's interest in universal education must be balanced against the parent's right to direct his or her children's religious education where those interests come into conflict.⁶⁶

When performing that balancing, the Court emphasized the damage that would allegedly be done if the children were required to attend school—"compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today."⁶⁷ At the same time, the Court discounted the benefits that would be accrued by enforcing the requirement.⁶⁸ The Court was unsympathetic to the State's claim that preventing the child from attending school past the eighth grade would promote ignorance,⁶⁹ explaining:

Whatever their idiosyncrasies as seen by the majority, this record strongly shows that the Amish community has been a highly successful social unit within our society, even if apart from the conventional 'mainstream.' Its members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms.⁷⁰

Suppose that Amish children who had not attended school past the eighth grade were to leave the community.⁷¹ The Court was confident that the children with their practical training and skills would not become burdens on society.⁷²

⁶⁴ *Id.* at 213.

⁶⁵ *Yoder*, 406 U.S. at 213–14.

⁶⁶ *Id.* at 214.

⁶⁷ *Id.* at 218.

⁶⁸ *Id.* at 222.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 224 ("The State argues that if Amish children leave their church they should not be in the position of making their way in the world without the education available in the one or two additional years the State requires.").

⁷² *Yoder*, 406 U.S. at 224.

Had there been clear evidence of harm, the Court might have reached a different result.⁷³ But the instant case was “not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred.”⁷⁴ Further, the Court cautioned that if the state law were enforced, the state would greatly influence if not determine the child’s “religious future.”⁷⁵

In *Prince*, the mere possibility of harm was enough to justify the state intervention. In *Yoder*, the harm had not been demonstrated and the Court nonetheless held that the State could not require high school attendance. The cases are reconcilable if the harm in *Prince* is characterized as significant (or, perhaps, very likely to occur) and the harm at issue in *Yoder* merely speculative.⁷⁶ However, *Yoder* might be read as affording strong free exercise protection,⁷⁷ and it along with *Sherbert v. Verner*⁷⁸ are read as two of the most protective of free exercise guarantees.⁷⁹

⁷³ Cf. *Parham v. J. R.*, 442 U.S. 584, 603 (1979) (“[A] state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.”).

⁷⁴ *Yoder*, 406 U.S. at 230.

⁷⁵ *Id.* at 232.

⁷⁶ *Id.* at 222 (“[T]he evidence adduced by the Amish in this case is persuasively to the effect that an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve those interests.”).

⁷⁷ Matthew D. Krueger, *Respecting Religious Liberty: Why RLUIPA Does Not Violate the Establishment Clause*, 89 MINN. L. REV. 1179, 1183–84 (2005) (“In *Wisconsin v. Yoder*, the Court offered perhaps its most robust protection of religious liberty, exempting an Amish family from a compulsory school-attendance law.”).

⁷⁸ 374 U.S. 398 (1963).

⁷⁹ Frederick Mark Gedicks, *The Improbability of Religion Clause Theory*, 27 SETON HALL L. REV. 1233, 1249 (1997) (“[T]he *Sherbert-Yoder* test appeared highly protective of religion.”); Jonathan Kieffer, *A Line in the Sand: Difficulties in Discerning the Limits of Congressional Power as Illustrated by the Religious Freedom Restoration Act*, 44 U. KAN. L. REV. 601, 604 (1996) (“The *Sherbert* Court’s standard of strict scrutiny relative to free exercise law was reinforced in 1972 in *Wisconsin v. Yoder*.”); Johnathan A. Mondel, *Mentally Awake, Morally Straight, and Unfit to Sit?: Judicial Ethics, the First Amendment, and the Boy Scouts of America*, 68 STAN. L. REV. 865, 875 (2016) (“The *Sherbert-Yoder* test was very protective of free exercise rights.”).

At issue in *Sherbert* was a challenge to a denial of unemployment benefits.⁸⁰ Adell Sherbert could not work on Saturday because her faith tradition treated that day as the Sabbath.⁸¹ But her employer fired her, and other employers were unwilling to hire her because she could not work on Saturday.⁸² Her application for unemployment compensation was denied, because of her unwillingness to accept appropriate employment without good cause.⁸³ The Court struck down the state refusal to award unemployment compensation.⁸⁴

In *Employment Division, Department of Human Resources of Oregon v. Smith*, the Court explained its *Sherbert* holding by noting that the “*Sherbert* test was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct,”⁸⁵ because in each case an assessment would be required to determine whether the good cause condition had been met. The *Smith* Court described *Yoder* as triggering a special hybrid exception involving free exercise and some other right such as the parent’s right to direct his or her child’s education.⁸⁶ Unless one of these two exceptions was applicable, the *Smith* Court concluded that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that

⁸⁰ See *Sherbert*, 374 U.S. at 400–01.

⁸¹ *Id.* at 399 (“[S]he would not work on Saturday, the Sabbath Day of her faith.”).

⁸² *Id.* (“Appellant, a member of the Seventh-day Adventist Church was discharged by her South Carolina employer because she would not work on Saturday, the Sabbath Day of her faith. . . . [S]he was unable to obtain other employment because from conscientious scruples she would not take Saturday work.”).

⁸³ *Id.* at 400–01 (“That law provides that, to be eligible for benefits, a claimant must be ‘able to work and. . . is available for work’; and, further, that a claimant is ineligible for benefits ‘(i)f . . . he has failed, without good cause . . . to accept available suitable work when offered him by the employment office or the employer”).

⁸⁴ *Id.* at 402 (“We reverse the judgment of the South Carolina Supreme Court.”).

⁸⁵ *Emp. Div., Dep’t of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 884 (1990).

⁸⁶ *Id.* at 881 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”⁸⁷

In other cases, the Court has affirmed the right of the parent to make decisions for his or her child. In *Troxel v. Granville*, the Court noted that the parent’s right to the care, custody, and control of his or her child is fundamental,⁸⁸ and that “the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a ‘better’ decision could be made.”⁸⁹

A number of points might be made about the Court’s jurisprudence. The Court has recognized that the parent’s right to direct the religious education of his or her child is fundamental. However, all of the cases have involved the parent’s right when weighed against the state. None of these cases involves the right of one parent pitted against the right of the other parent, so it is unclear what the Court would say when confronted with that kind of scenario. Two further points should be noted. Courts make individualized assessments when deciding who should have custody and what kinds of limitations may be imposed on a parent’s religious education of his or her child. This may well implicate the kind of close scrutiny triggered in *Sherbert*.⁹⁰ Further, the Court recently explained that “government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise.”⁹¹ Whether secular activities are comparable is to be determined in terms of the asserted state interest.⁹² Assuming that strict scrutiny has been triggered, the state must “show that mea-

⁸⁷ *Id.* at 879 (citing *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

⁸⁸ *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

⁸⁹ *Id.* at 72–73.

⁹⁰ *See supra* note 85 and accompanying text (discussing the individualized assessment at issue in *Sherbert*).

⁹¹ *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67–68 (2020)).

⁹² *Id.* (whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue.”) (citing *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 67).

sure less restrictive of the First Amendment activity could not address its interest.”⁹³ But this means that if noncustodial parents are not or cannot be precluded from engaging in certain secular activities that the State believes contrary to a child’s interests, then the State may also be precluded from prohibiting a parent from engaging in certain religious activities that the State believes contrary to the child’s interests.

The Court’s current understanding of free exercise guarantees is that they are rather robust. It may well be, for example, that the kind of restriction upheld in *Prince* would not pass muster in light of the Court’s current understanding of the strength of those guarantees. Even if the *Sherbert* balancing was not triggered by virtue of a court’s performing an individualized assessment when deciding the degree to which a parent’s inculcation of religious values could be limited, a parent’s teaching his or her child religious values would likely implicate both free exercise and the right to educate, which would mean that any state attempts to limit a parent’s teaching of religious values to her or his child would be subject to the kind of scrutiny associated with *Yoder*. When strict scrutiny is triggered, the State will face a daunting task in trying to establish that there were no less restrictive means to promote the state’s implicated interest. In short, the current jurisprudence will make it much harder for states to limit noncustodial parents in their attempts to inculcate religious values in their children than many state courts seem to appreciate.

III. State Cases Involving Parents in Conflict over Their Children’s Religious Training

While the U.S. Supreme Court has not addressed the constitutional limitations on the resolution of disputes between divorced parents over their children’s education, state courts have often needed to do so, and the states have come up with varying approaches to resolve these disputes.⁹⁴ This is a particularly

⁹³ *Id.* at 1296–97.

⁹⁴ Kevin S. Smith, *Religious Visitation Constraints on the Noncustodial Parent: The Need for National Application of a Uniform Compelling Interest Test*, 71 IND. L.J. 815, 816 (1996):

thorny area, which is likely to become even more so in light of the changing free exercise landscape.

A. *Extreme Cases No Longer Extreme?*

Courts have long sought to balance children's welfare interest with religious guarantees. That has sometimes come up in the context of trying to make decisions about who would have custody, and courts have been unwilling to treat practices motivated by religious beliefs in the same way that those practices would have been treated had they been motivated by purely secular concerns.

Consider *Quiner v. Quiner*.⁹⁵ Linnea and Edward Quiner had one child, and the parents each sought primary custody.⁹⁶ The trial court awarded custody to the father and enjoined the mother from teaching the child her religious views.⁹⁷ Linnea sincerely believed⁹⁸ that she was religiously required not to associate with those who did not share her beliefs,⁹⁹ because non-adherents were "spiritually unclean."¹⁰⁰ Because her ex-husband, Edward, did not share her beliefs, she could not associate with

Currently, jurisdictions differ on what rights noncustodial parents should enjoy in the religious upbringing of their children. Some courts hold that the noncustodial parent has relatively few rights in this area. Others recognize that he does have constitutionally protected rights, but differ on the appropriate degree of protection those rights should receive.

⁹⁵ *Quiner v. Quiner*, 59 Cal. Rptr. 503 (Cal. Ct. App. 1967).

⁹⁶ *Id.* at 504 ("Edward sued for divorce on November 29, 1963, alleging extreme mental cruelty and requesting custody of John Edward. Linnea cross complained for separate maintenance and custody.")

⁹⁷ *Id.* ("The judgment, among other things, granted visitation rights to Linnea, but enjoined her . . . from teaching or informing said child of any matter or thing or religious belief concerning the Plymouth Brethren.")

⁹⁸ *Id.* at 517 ("There is no dispute that appellant is a sincere believer in a bona fide faith.")

⁹⁹ *See id.* at 504.

¹⁰⁰ *Id.* at 508. *Cf.* *Harrison v. Tauheed*, 235 P.3d 547, 558–59 (Kan. Ct. App. 2010), *aff'd*, 256 P.3d 851 (Kan. 2011):

Adiel next complains of the following excerpt from the trial court's memorandum decision: "The teachings of the Jehovah's Witnesses, including those that teach non-Jehovah's Witnesses will suffer annihilation, may not be considered by this Court in deciding custody issues." Based on this statement, Adiel claims the trial court ignored evidence that these religious doctrines were harming J.D.H., specifically, "the

him. Further, she would teach her child not to associate with his father.¹⁰¹ That said, however, she would also teach their son that he should love and honor his father.¹⁰²

In Linnea's faith tradition, children are discouraged or forbidden from engaging in any extracurricular activities at school.¹⁰³ Children are not permitted to play games, listen to music or the radio, or watch TV.¹⁰⁴ Reading literature, periodicals or newspapers is discouraged or banned, although Bible-reading is not discouraged.¹⁰⁵

The trial court had awarded custody to the father because "the child's mental welfare, and opportunities for his intellectual, social, character and personality growth will best be served by granting custody to the plaintiff."¹⁰⁶ The intermediate appellate court reversed, because at the time California used the tender years doctrine under which the mother would be awarded custody of a young child as a general matter,¹⁰⁷ and because the

alienating affect [*sic*]" of the "teaching" that Adiel is 'God's foe' and a "non-believer" who will eventually have his head chopped off. "

¹⁰¹ See *Quiner*, 59 Cal. Rptr. at 505.

¹⁰² *Id.* ("I would teach him to love his father as a son and as his father and to respect him in every way and to obey him.").

¹⁰³ *Id.* at 508 ("While permitted to attend public schools as required by law, children are discouraged, if not forbidden as sinful, from participating in all forms of extracurricular activity. This includes all forms of participation in athletic, dramatic, musical, social, literary, scientific, political and other extra scholastic activities."). See also *Peterson v. Peterson*, 474 N.W.2d 862, 871 (Neb. 1991) ("There was also testimony that the father feels that certain behavior and activities apparently forbidden or discouraged by the mother's church are appropriate for his children. These include permitting the children to watch television, participate in school sports, and dress in a contemporary manner.").

¹⁰⁴ *Quiner*, 59 Cal. Rptr. at 508-09

All forms of public or private entertainment are discouraged, if not forbidden. This edict excludes all types of social games such as card playing, dominoes, checkers and chess. In the defendant's home neither radio, television nor recorded music is permitted. Children may not have toys. If anyone outside the group should give a child a toy, a radio, television set or record player it would not be permitted in the house but would be returned to the giver.

¹⁰⁵ *Id.* at 509 ("The reading of all forms of literature and periodicals is discouraged or banned, except the Bible. This includes current news media.").

¹⁰⁶ *Id.* at 508.

¹⁰⁷ See *id.* at 517 ("The law is settled, that all things being equal, the custody of a child of tender years should go to the mother."). See also *id.* at 515

court reasoned that the state could not take religious beliefs into account.¹⁰⁸ The court admitted that had the mother held these beliefs as a secular matter, the father would have been awarded custody.¹⁰⁹

(“We have found no case, with the exception of *Barbush*, . . . which even squints at holding that a court can take a child of tender years away from the mother because of a potential effect the religious views of the mother may have on the mental welfare of her child.”). The *Quiner* court may have been referring to *Com. ex rel. Barbush v. Barbush*, 71 Pa. D. & C. 442 (Com. Pl. 1950), where the *Barbush* court refused to grant custody of a child to the mother, where the father and grandparents seemed to be taking good care of the child. *See id.* at 451 (“The weight of the evidence indicates clearly that this child, Francis Charles Barbush, 2nd, is at the present time receiving the devotion of his father and paternal grandparents as well. The child is receiving requisite supervision and adequate care.”).

One reason the court did not grant custody to the mother was the court’s belief that the father would then not get to see the child because the mother and father had sectarian differences. *Id.* at 452 (“If this child were entrusted to the mother, any visitation with the father would almost certainly result in serious emotional disturbance because of the sectarian differences of these parents.”).

¹⁰⁸ *Quiner*, 59 Cal. Rptr. at 516 (“We cannot proscribe the doctrine of separation, as taught by the Brethren, because, although it is admittedly a spiritual doctrine, temporal effects may cause deviation from the accepted norm.”) *See also Harrison*, 235 P.3d at 549:

Of particular note, Adiel also asserts the trial court applied an incorrect legal standard, which resulted in the court’s failure to consider evidence about Monica’s religious beliefs and practices as a Jehovah’s Witness. Adiel claims these religious beliefs and practices have adversely affected or could adversely affect J.D.H. in the future. As discussed more fully below, we review Kansas law regarding the legal standard a trial court should apply to evidence of a parent’s religious beliefs and practices in a child custody case. We hold that a parent’s religious beliefs and practices may not be considered by the trial court as a basis to deprive that parent of custody unless there is a showing of actual harm to the health or welfare of the child caused by those religious beliefs and practices.

¹⁰⁹ *Quiner*, 59 Cal. Rptr. at 518:

The fact that judged by the common norm, it may be logically concluded that custody in the father is for the child’s best interests, does not warrant us in taking custody away from the mother when such an order must be bottomed on our opinion that the mother’s religious beliefs and teachings, in their effect on the child, are and will continue to be contrary to child’s best interests.

The court offered reasons to believe that the mother having custody would not have the dire effects predicted by the father, for example, that the father's relationship with the child would be greatly compromised.¹¹⁰ Hopeful that the father would be able to promote his relationship with the child when the father had visitation,¹¹¹ the court noted that thus far there was no evidence that the father's relationship with the child had suffered.¹¹²

Yet, the father's relationship with the child had not suffered because the father had had custody. When the father had had custody, there was no evidence that the son had been alienated from the mother,¹¹³ and it seemed at least probable that the mother having custody would result in a souring of the relationship between the father and child.¹¹⁴

The *Quiner* court noted that the custodial parent gets to determine the child's religion,¹¹⁵ which would mean that "the child

¹¹⁰ *Id.* at 513 ("We are sensitive to the revelation . . . that custody in the mother may breed in John Edward a lack of religious and filial rapport with his father and the father's parents, and may possibly breed definite antipathy to his father and his paternal grandparents.").

¹¹¹ *Id.* at 514 ("[W]e have no right to assume that the father, even though custody is in the mother, will have no effect whatsoever in the upbringing of John Edward. Liberal rights of visitation plus weekends and part of summer vacations with the father would supply ample opportunity.").

¹¹² *Id.* at 517–18 ("There is no showing at bench . . . that any acts of appellant (other than her admission that the child is and will be taught the doctrine of separation), has in any way diminished his affection and devotion to his father. There is no evidence, and indeed it may have been too early to accumulate any evidence, that the doctrine of separation had in any manner affected the child's physical, emotional or mental well-being.").

¹¹³ *Id.* at 514 ("[I]t may be persuasively argued that custody in the father would have little or no effect on the child's affection for his mother and may result in nothing other than a sympathetic tolerance of the mother's espousal of the principle of separation.").

¹¹⁴ *Id.* at 513 ("[C]ustody in the mother may breed in John Edward a lack of religious and filial rapport with his father . . . , and may possibly breed definite antipathy to his father We agree that it is probable that such attitude may interfere with complete empathy between the child and the father."). See also Michael Loatman, *Protecting the Best Interests of the Child and Free Exercise Rights of the Family*, 13 VA. J. SOC. POL'Y & L. 89, 107 (2005) ("In *Quiner*, the mother's behavior was likely to lead to alienation by the child toward his father.").

¹¹⁵ *Quiner*, 59 Cal. Rptr. at 513 ("[T]he parent having the custody of a child has the right to bring up the child in the religion of such parent.").

would be taught his father is ‘unclean,’ . . . [which] obviously is not for the best interests of the child.”¹¹⁶ Yet, custody could not be awarded to the father on that account, given that the beliefs at issue were religious.¹¹⁷ To justify awarding custody to the father, “[e]vidence [would have to] . . . be produced which . . . [would] sustain a finding that there . . . [was] actual impairment of physical, emotional and mental well-being contrary to the best interests of the child.”¹¹⁸

The court was setting a high bar.¹¹⁹ Because the child was quite young at the time of trial, the required evidentiary showing regarding the harmful effects of separation could not be made,¹²⁰ which meant that the father would be unable to show that the child would be harmed if placed in the mother’s custody.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 518:

The fact that judged by the common norm, it may be logically concluded that custody in the father is for the child’s best interests, does not warrant us in taking custody away from the mother when such an order must be bottomed on our opinion that the mother’s religious beliefs and teachings, in their effect on the child, are and will continue to be contrary to child’s best interests.

¹¹⁸ *Id.* at 516.

¹¹⁹ *Cf.* Kent Greenawalt, *Child Custody, Religious Practices, and Conscience*, 76 U. COLO. L. REV. 965, 975 (2005) (discussing “the nearly absolutist approach of *Quiner*”).

¹²⁰ *Quiner*, 59 Cal. Rptr. at 511:

At bench too, there is no evidence, nor could there have been, since John Edward was at the time of the trial two and one-half years old, that the principle of separation manifested by such requirements as eating lunch apart from his schoolmates, or remaining aloof from them and their activities, had actually taken place and had impaired the physical, emotional and mental health and well-being of the child.

Many states, including California,¹²¹ require that either actual harm have occurred *or* that harm would probably occur.¹²² One would have expected the *Quiner* court to discuss whether harm would probably occur. It was simply unclear whether the court was requiring that harm be *actually* established with the understanding that although harm could not then be established the father could later file for a modification of custody if that showing could be made¹²³ or, instead, was simply unconvinced that harm was likely to occur.¹²⁴ It may be that the court was suggesting that as a general matter courts consider actual or probable harm but where religion is concerned the court is not

¹²¹ See *In re Marriage of Weiss*, 49 Cal. Rptr. 2d 339, 345–46 (Cal. Ct. App. 1996):

Given the constitutional dimensions of the matter, it appears to this court *Zummo* wisely declines to speculate that such exposure is harmful, and instead, requires the party seeking the restriction to demonstrate by competent evidence the belief or practice of the party to be restricted actually presents a substantial threat of harm to the child.

(citing *Zummo v. Zummo*, 574 A.2d 1130, 1154–55, 1157 (Pa. Super. Ct. 1990)).

¹²² See *Wilson v. Davis*, 181 So. 3d 991, 995 (Miss. 2016). Cf. *In re J.E.*, 723 N.W.2d 793, 798 (Iowa 2006) (state laws “are designed to prevent probable harm to the child and the State is not required to wait until actual harm has occurred”); *Kirchner v. Caughey*, 606 A.2d 257, 262 (Md. 1992) (“A factual finding of a causal relationship between the religious practices and the actual or probable harm to a child is required.”); *Blixt v. Blixt*, 774 N.E.2d 1052, 1059 (Mass. 2002) (“[T]he State has a compelling interest to protect children from actual or potential harm.”).

¹²³ *Quiner*, 59 Cal. Rptr. at 518 (“[I]f, as a consequence of the teaching of the principle of separation to the child, it be shown that John Edward’s physical, emotional and mental well-being has been affected and jeopardized . . . the courts of our state are open forums to which father has ready access for relief.”).

¹²⁴ *Quiner*, 59 Cal. Rptr. at 514:

[W]e have no right to assume that the father, even though custody is in the mother, will have no effect whatsoever in the upbringing of John Edward. Liberal rights of visitation plus weekends and part of summer vacations with the father would supply ample opportunity. The evidence shows the father to be a worker and a Godfearing man, devoted to the child.

See also *Loatman*, *supra* note 114, at 108 (“Nonetheless, the *Quiner* Court thought it very possible there would be no alienation.”).

permitted to make a judgment about whether harm would likely occur.¹²⁵

Quiner has been criticized for having been too deferential to religion, especially to minority religions that govern all aspects of life.¹²⁶ Yet, at least one difficulty with that criticism is that the *Quiner* court sent mixed messages, so it is not quite clear what the court was saying. For example, the court explained that “[i]f it be shown at any time in the future that appellant, contrary to established legal principles and proper injunctive order is teaching John Edward not to love and respect his father, such direct indoctrination would undoubtedly require the application of sanctions.”¹²⁷

Here, the court seemed to be suggesting that if the religious teaching resulted in the child not loving and respecting his father, then the court could take action, notwithstanding that the teaching merely involved inculcation of the sincerely held religious beliefs. According to this interpretation of the opinion, once harm has been established (or, perhaps, once the likelihood of harm is sufficiently high), the court can act, even if the actual or probable harm results from religious teaching. Yet, if this interpretation is correct, then the court may not be according religious teaching

¹²⁵ *Quiner*, 59 Cal. Rptr. at 516:

Precisely because a court cannot *know* one way or another, with any degree of certainty, the proper or sure road to personal security and happiness or to religious salvation, which latter to untold millions is their primary and ultimate best interest, evaluation of religious teaching and training and its projected as distinguished from immediate effect (psychologists and psychiatrists to the contrary notwithstanding) upon the physical, mental and emotional well-being of a child, must be forcibly kept from judicial determinations.

¹²⁶ Carl E. Schneider, *Religion and Child Custody*, 25 U. MICH. J.L. REFORM 879, 888 (1992):

Far from being “neutral,” the *Quiner* test disadvantages parents who are not members of what we may call other-worldly sects. Members of such separatist sects tend to be governed in all aspects of their lives by their religion. Excluding religiously based behavior from consideration in custody disputes involving a member of an other-worldly sect excludes almost everything from consideration.

Loatman, *supra* note 114, at 101 (“[T]he *Quiner* rule is poor policy in that it favors the parent with an uncommon religion over a more mainstream parent.”).

¹²⁷ *Quiner*, 59 Cal. Rptr. at 518.

sufficient protection, at least in light of the Court's current jurisprudence. Presumably, a parent could not be precluded from mentioning *anything* negative about the other parent for fear that doing so might undermine the relationship between the other parent and the child.¹²⁸ If that is so, then the question will be whether the (prohibited) religious expression is being treated less favorably than some (permissible) nonreligious expression.

A different way of reading *Quiner* protects religious expression much more robustly. If legal principles preclude the state from prescribing religious beliefs because of the "complete integrity of freedom of conscience guaranteed by the Constitution,"¹²⁹ then no *established* legal principle or *proper* injunctive order could require the mother to say something contrary to faith or not say something required by faith, which might mean (depending upon the content of her religious belief) that she could not be precluded from directing her son to refrain from loving and respecting her father. But according to this reading, the courts would be quite constrained in the kinds of limitations that they may impose on religious teaching, even if it might result in foreseeable harm.

Yet another way to read the *Quiner* opinion is that notwithstanding sincere religious belief the court could preclude the mother from telling the son to disrespect his father, but the court could not preclude the mother from saying that he should respect but remain separate from his father.¹³⁰ This interpretation emphasizes that the "direct indoctrination"¹³¹ must not involve teaching him to disrespect his father, although more indirect indoctrination (the father is worthy of respect but associating with

¹²⁸ See *In re Marriage of McSoud*, 131 P.3d 1208, 1216 (Colo. App. 2006) ("[A] parental responsibilities order[] that infringes on [the] . . . constitutional right [of a fit legal parent] is permissible only if it is necessary to promote a compelling state interest and does so in the least restrictive manner possible.").

¹²⁹ *Quiner*, 59 Cal. Rptr. at 512 (citing *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639-42 (1943)).

¹³⁰ *Id.* at 514:

The principle of separation, assuming it 'takes,' although causing a spiritual cleavage and possibly one in habits of life between father and son, does not necessarily detract from the love, respect and devotion which can be engendered and impelled in a son by a God-fearing, loving and devoted father.

¹³¹ *Id.* at 518.

him might result in the son's losing his way) might be permissible. This approach would not solely be concerned with the goal (promoting respect for the noncustodial parent) but, in addition, would also be concerned with the means (no direct undermining of respect). The emphasis on the means is appropriate, given the Court's emphasis on narrow tailoring.¹³² But the direct/indirect approach might not be sufficiently closely tailored to the goal, because indirect methods might be quite efficacious in bringing about undesirable results, which might mean that a prohibition of direct undermining would be struck down because not sufficiently closely tailored to the state's interest. Thus, because the indirect method was permissible even though undermining the state interest, the state would not be allowed to prohibit the direct method (which was no more efficacious in undermining the state interest).

Suppose that a particular faith tradition rejects divorce and holds that adultery is sinful. A couple receives a civil divorce and the custodial parent begins a new relationship. The noncustodial parent whose faith tradition both rejects divorce and holds that a relationship with someone other than the (religiously recognized) marital partner constitutes adultery might teach that the ex-spouse is an adulterer.¹³³ Or, the non-custodial parent might instead discuss the religion's tenets about marriage and relationships outside of marriage, but let the child connect the dots with respect to whether the custodial parent was committing adultery. The direct versus indirect distinction would seem to permit the latter but not the former, and the two approaches might well be equally effective in undermining the custodial parent.

Quiner makes clear that matters that normally could be taken into account in determining best interests may be consid-

¹³² See *supra* note 93 and accompanying text.

¹³³ See *Willis v. Willis*, 775 N.E.2d 878, 881 (Ohio Ct. App. 2002). See also *Becnel v. Becnel*, 732 So. 2d 589, 591 (La. Ct. App. 1999) ("Kathleen contended that Robert's marriage to Diane is 'nothing less than adultery in religious terms, because his marriage vows have not been declared invalid by any ecclesiastic authority. His violation of those vows, according to Catholic teaching, is a mortal sin.'"). By the same token, the custodial parent might object to the child visiting with the non-custodial parent who is allegedly an adulterer. See *In re Marriage of Roberts*, 503 N.E.2d 363, 364 (Ill. App. Ct. 1986).

ered off the table because they are religiously inspired.¹³⁴ Where there is another way to determine custody, e.g., some kind of tender years presumption,¹³⁵ the court will be able to decide who gets custody, even if that decision would be unlikely to promote the child's best interests. But if the tender years presumption is not used because of equal protection concerns,¹³⁶ then the court may have some trouble deciding who should get custody,¹³⁷ because matters that would otherwise be appropriate to consider must now be ignored. For example, a parent might believe as a religious matter that parents should be distant and authoritarian. A parent being authoritarian might be disfavored as a secular matter,¹³⁸ but *Quiner* suggests that the factor should not be considered if based on religious principles.

Various state courts have offered a fairly narrow interpretations of *Quiner*. For example, citing *Quiner* in support, the Colorado Supreme Court suggested that "Courts are precluded by the free exercise of religion clause from weighing the comparative merits of the religious tenets of the various faiths or basing its

¹³⁴ *But see* *Schneider*, *supra* note 128, at 889 ("How, then, should a court treat a case like *Quiner*? I do not see any wholly satisfactory principle. However, I would propose that a court treat such cases no differently from the other custody cases it considers.").

¹³⁵ *See supra* note 107.

¹³⁶ *Ex parte Devine*, 398 So. 2d 686, 695 (Ala. 1981) ("[T]he tender years presumption represents an unconstitutional gender-based classification which discriminates between fathers and mothers in child custody proceedings solely on the basis of sex.").

¹³⁷ *See Schneider*, *supra* note 126, at 888 ("Excluding religiously based behavior from consideration in custody disputes involving a member of an otherworldly sect excludes almost everything from consideration."); *Hoedebeck v. Hoedebeck*, 948 P.2d 1240, 1242 (Okla Civ. App. 1997):

While Lisa characterizes the placement of the children with Raymond as religiously motivated, the evidence showed the children were being emotionally harmed by the actions of Lisa in ways which did not include the religion matter. Again, the court may not decide that one religion is better or worse than another, but it does have the duty to determine the best interests of the children. To fail to consider the impact of certain actions the parents take, simply because the actions are labeled religious would be to exempt such acts from consideration, no matter the impact on the children.

¹³⁸ *See, e.g., Com. ex rel. Husack v. Husack*, 417 A.2d 233, 236 (Pa. Super. Ct. 1979) (custody not awarded to father, at least in part, because of his "overly-authoritarian nature").

custody decisions solely on religious considerations.”¹³⁹ While these narrow interpretations are correct in that the *Quiner* court held that custody decisions could not be based solely on religious considerations, *Quiner* was much more deferential to religion than these interpretations imply, for example, because *Quiner* suggests that would what normally be included in a best interests analysis would not permissibly be included if religiously inspired.¹⁴⁰

The *Quiner* trial court had precluded the mother from teaching her child about a tenet of their faith—separation from non-adherents.¹⁴¹ Suppose that the appellate court had permitted the father to retain custody. Under what conditions, if any, could the court have precluded the mother from teaching her child about her religious views? The appellate court had noted that the child’s relationship with his parents had not suffered while his father had had custody,¹⁴² although the mother had presumably refrained from discussing the doctrine of separation while she was visiting with the child.¹⁴³

B. *Limiting Noncustodial Parent Religious Instruction*

As a general matter, states agree that noncustodial parents can be precluded from giving religious instruction to their children where doing so would be harmful.¹⁴⁴ However, states are

¹³⁹ *In re Marriage of Short*, 698 P.2d 1310, 1313 (Colo. 1985) (citing *Quiner*). See also *Clift v. Clift*, 346 So. 2d 429, 434 (Ala. Civ. App. 1977) (“[C]ourts have repeatedly declared that religious beliefs alone shall not constitute the sole determinant in child custody awards.”); *Pater v. Pater*, 588 N.E.2d 794, 798 (Ohio 1992) (“[C]ustody cannot be awarded solely on the basis of the parents’ religious affiliations and that to do so violates the First Amendment to the United States Constitution.”).

¹⁴⁰ See *supra* note 134 and accompanying text.

¹⁴¹ *Quiner*, 59 Cal. Rptr. at 504 (“The judgment, among other things, granted visitation rights to Linnea, but enjoined her ‘. . . from teaching or informing said child of any matter or thing or religious belief concerning the Plymouth Brethren, or the ‘Exclusive Brethren’, or the concept of ‘separation’ as believed or practiced by the ‘Exclusive Brethren.’”).

¹⁴² See *supra* notes 112-13.

¹⁴³ The appellate court implied that she had abided by the trial court’s restriction. See *Quiner*, 59 Cal. Rptr. at 513 (“The mother, as custodian, *would thus have* the opportunity to inculcate the principle of separation in the mind of the child.”) (italics added).

¹⁴⁴ *McSoud*, 131 P.3d at 1215:

often insufficiently clear about how much or what kind of harm must be actual or probable in order to justify a restriction.¹⁴⁵ Nor are they clear about how closely tailored the restriction must be to pass constitutional muster.

Some kinds of harm are grave and imminent and so justify extreme measures. For example, courts use the refusal to author-

Although this issue has not yet been addressed in Colorado, courts in most other states have also recognized that, absent a clear showing of substantial harm to the child, a parent who does not have decision-making authority with respect to religion nevertheless retains a constitutional right to educate the child in that parent's religion.

In re Marriage of Jensen-Branch, 899 P.2d 803, 808 (Wash. Ct. App. 1995):
[I]n order to protect the parents' respective constitutional rights to the free exercise of religion, Washington courts have created a separate standard where a trial court's order regarding decision-making authority restricts those rights: there must be a substantial showing of actual or potential harm to the children from exposure to the parents' conflicting religious beliefs.

Zummo v. Zummo, 574 A.2d 1130, 1154–55 (Pa. Super. Ct. 1990):

The vast majority of courts addressing this issue, . . . have concluded that each parent must be free to provide religious exposure and instruction, as that parent sees fit, during any and all period of legal custody or visitation without restriction, unless the challenged beliefs or conduct of the parent are demonstrated to present a substantial threat of present or future, physical or emotional harm to the child in absence of the proposed restriction.

But see Lange v. Lange, 502 N.W.2d 143, 146 (Wis. Ct. App. 1993), *on reconsideration* (May 18, 1983):

Because sec. 767.001(2m), Stats., confers on Elizabeth as the custodial parent the sole right to choose the religion of the children, the trial court possesses discretion to fashion reasonable restrictions to protect her choice. First, sec. 767.24(1), Stats., empowers the court to make just and reasonable provisions regarding custody and placement. The court may therefore place reasonable restrictions on visitation. Second, the custodial parent's exclusive right to choose the religion is meaningless without protection from subversion. Since Robert, as the non-custodial parent, has no right to participate in the choice, he cannot complain if his visits with the children are reasonably restricted to protect Elizabeth's choice.

¹⁴⁵ Cf. Nelson A. Mendez, *Child Custody Entangled with Religion: Osteraas v. Osteraas*, 31 IDAHO L. REV. 339, 346 (1994) ("If the Idaho Supreme Court wishes to adopt a strict standard of noninterference with religious matters in custody disputes, it needs to give directions as to when and in what manner intervention is appropriate.").

ize blood transfusions or the administration of needed medicine in emergency circumstances as a clear example of harm justifying state intervention.¹⁴⁶ Yet, the fact that some faith traditions preclude certain kinds of medical treatment does not mean that a parent in that tradition should be denied custody where there is only a slight risk that such emergency conditions will present themselves.¹⁴⁷ Indeed, even were the risk to present itself while such a parent had custody, a court might appoint a temporary guardian to authorize the needed procedure or medication.¹⁴⁸

Suppose that a child is harmed not by the religious teaching per se, but because the teachings of the custodial and noncustodial parent conflict, and the existence of the conflict is causing

¹⁴⁶ See *Int. of Ivey*, 319 So. 2d 53, 58 (Fla. Dist. Ct. App. 1975) (“[T]he overwhelming weight of authority throughout the country supports the view that the state, as *parens patriae*, may step in and protect the rights of a child threatened with death because its natural parents will not consent to medical treatment because of religious beliefs or otherwise.”).

¹⁴⁷ See *Garrett v. Garrett*, 527 N.W.2d 213, 221 (Neb. App. 1995)

Likewise, regarding Jeanne’s refusal to consent to a blood transfusion for her children even in the event of an emergency, no evidence was presented showing that any of the minor children were prone to accidents or were plagued with any sort of affliction that might necessitate a blood transfusion in the near future. We cannot decide this case based on some hypothetical future accident or illness which might necessitate such treatment.

In re Stevens, 851 N.Y.S.2d 66, *3 (Sur. 2007)

While neither side submitted evidence on the frequency with which the necessity for blood transfusions arises, the possibility that Natalie’s life could be threatened by refusal of a transfusion is surely remote. There is no controlling case law that would prevent granting –A guardianship—or custody of a minor child—to a parent solely because of her unwillingness to consent to a blood transfusion on some hypothetical future occasion. .

See also *Harrison*, 235 P.3d at 557:

Kansas law provides that a parent’s religious beliefs and practices may not be considered by the trial court as a basis to deprive that parent of custody unless there is a showing of actual harm to the health or welfare of the child caused by those religious beliefs and practices.

¹⁴⁸ *In re Guardianship of L.S. & H.S.*, 87 P.3d 521, 522 (Nev. 2004) (“[W]hen the parents refused to consent to medically necessary care for H.S. based on their religious convictions, the district court did not abuse its discretion in appointing Valley Hospital as a temporary guardian to make decisions to provide medically necessary, life-saving treatment for H.S.”).

the child stress.¹⁴⁹ A court might well be asked to prevent the noncustodial parent from increasing the child's stress by instructing the child in ways that contradict the custodial parent's teachings.

Several issues might have to be addressed. One would be whether the court prohibited all nonreligious content that might cause the child stress. Parents might disagree about many issues including the relative importance of appearance, athletics, academics, and social life. These differences might also cause the child to feel stress, because the child might want to please both parents but would be unable to do so because the parents had incompatible views.¹⁵⁰ But a failure to impose restrictions in

¹⁴⁹ See, e.g., *Funk v. Ossman*, 724 P.2d 1247, 1251 (Ariz. Ct. App. 1986) (“As a result of being put in the middle of the relationship between his parents, his anxiety is manifested by the encopresis [soiling his pants]. He feels that he is a mediator and must please both parents, including pleasing them over the religious issue.”); *LeDoux v. LeDoux*, 452 N.W.2d 1, 3 (Neb. 1990) (“[C]onflicts in the Catholic and Jehovah’s Witnesses religions were an obvious contributing factor to the stress felt and manifested by Andrew.”); *Bentley v. Bentley*, 448 N.Y.S.2d 559, 559 (N.Y. App. Div. 1982) (“The Family Court found that the children were ‘emotionally strained and torn’ as a result of the parties’ conflicting religious beliefs.”); *Meyer v. Meyer*, 789 A.2d 921, 924 (Vt. 2001) (“Mother presented extensive evidence that the conflicting practices and rules in each household that stemmed from her and father’s disparate religious beliefs were causing Hannah and Hillary to experience extreme confusion and anxiety.”).

But see *Pierson v. Pierson*, 143 So. 3d 1201, 1203 (Fla. Dist. Ct. App. 2014):

While the mother’s concern that exposure to two different religions could confuse the children may be reasonable, neither that concern nor the evidence presented below established the requisite showing of harm to grant the mother ultimate religious decision-making authority for the children and to restrict the father from “doing anything in front of the children or around the children that . . . conflicts with the Catholic religion.”;

McSoud, 131 P.3d at 1217 (“We also agree with those courts that have found merely exposing a child to a second religion need not be harmful, and indeed may be healthy for the child.”).

¹⁵⁰ See, e.g., *Andros v. Andros*, 396 N.W.2d 917, 920 (Minn. Ct. App. 1986) (“Dr. Scurry offered his opinion that . . . because the children are so closely bonded with both parents, they feel a need to try to please both. However, the children know that to please one parent necessarily involves displeasing the other.”).

these areas might mean that a restriction on religious instruction would not pass muster.¹⁵¹

In addition, courts would have to examine whether the adopted means was the least restrictive.¹⁵² For example, suppose that the parents disagreed about how modestly a child should dress. One possibility would be to have the child abide by each parent's rules when with that parent.¹⁵³ But that might mean that barring a parent from expressing views about modesty might be struck down because a less restrictive means could be adopted to reduce the child's stress level.¹⁵⁴

In *In re Marriage of McSoud*,¹⁵⁵ a Colorado appellate court explained that "[g]overnmental interference with the constitutional rights of a fit, legal parent is subject to strict scrutiny."¹⁵⁶ At issue (among other matters) was a restriction of the "mother's right to take the child to her church unless she support[ed] the religion chosen by father for the child."¹⁵⁷ The intermediate appellate court suggested that such a restriction was unconstitutional,¹⁵⁸ explaining that the "right of all citizens freely to pursue their religious beliefs is guaranteed by the Free Exercise Clause of the First Amendment of the United States Constitution."¹⁵⁹

¹⁵¹ See *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021); ("[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise.") (citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. at 67-68).

¹⁵² See *supra* note 93 and accompanying text.

¹⁵³ See *Hobby v. Walker*, 385 S.W.3d 331, 333 (Ark. Ct. App. 2011) ("[A]t her father's home, G.W. is not allowed to listen to music unless it is Christian music that their church listens to, and she cannot wear jeans, skirts, or shorts. Brooke would allow G.W. to wear shorts and jeans."); *id.* at 334 ("Regarding G.W.'s dress, Tommy denied that he had a dress code and said that G.W. had a choice as to what she could wear at home, although he said that there were 'certain limits' in that her clothing had to be 'modest.'").

¹⁵⁴ *Cf. Kirchner v. Caughey*, 606 A.2d 257, 264 (Md. 1992) ("The record would also support findings that the father has created conflict within the child's mind and caused anxiety by imparting his views on modesty to the child through the criticism of a bathing suit furnished by the mother.").

¹⁵⁵ 131 P.3d 1208.

¹⁵⁶ *Id.* at 1216.

¹⁵⁷ *Id.* at 1214.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 1215.

That constitutional right is not contingent on a state court's having awarded custody to that parent. Rather, "absent a clear showing of substantial harm to the child, a parent who does not have decision-making authority with respect to religion nevertheless retains a constitutional right to educate the child in that parent's religion."¹⁶⁰ Further, it should not be thought that establishing harm will be relatively easy. There must be "a clear and affirmative showing of harm to the children."¹⁶¹ The showing that is required in this context will likely exceed the showing that would be required in a secular context.

Several courts have discussed what does not suffice to establish sufficient harm. *Hanson v. Hanson*¹⁶² involved a divorced couple, one of whom was Catholic and the other a member of the Pentecostal Apostolic Church.¹⁶³ The court noted that "the physical or emotional harm to the child resulting from the conflicting religious instructions or practices cannot be simply assumed or surmised, but must be demonstrated in detail."¹⁶⁴

The mother, the custodial parent, had testified that "the boys do not like to visit with James because 'he has been telling them they are not religious,' that 'the Catholic church believes in cannibalism,' and that 'the Catholic church and Lutheran church taught false doctrine.'"¹⁶⁵ She also testified that "the boys are being 'pulled back and forth' because of the conflict in their parents' religious beliefs and that this 'upsets' them."¹⁶⁶ However, the appellate court found that "the evidence in this case falls short of the clear and affirmative showing of physical or emo-

¹⁶⁰ *McSoud*, 131 P.3d at 1215. Not all state courts seem to understand this. See *Andros*, 396 N.W.2d at 924:

We hold that the court's decision does not affect appellant's constitutional right to freedom of religion. Although appellant's wish to involve the children in his religious activities is now subject to respondent's consent while they are minors, appellant is, and always has been, free to practice his religious beliefs as he sees fit.

¹⁶¹ *Khalsa v. Khalsa*, 751 P.2d 715, 721 (N.M. Ct. App. 1988).

¹⁶² 404 N.W.2d 460 (N.D. 1987).

¹⁶³ *Id.* at 462.

¹⁶⁴ *Id.* at 464.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 464-65.

tional harm to the children required to justify the religious restrictions placed upon James' visitation rights."¹⁶⁷

In *Munoz v. Munoz*, the children were raised in both the Catholic and Church of the Latter Day Saints traditions.¹⁶⁸ The Washington Supreme Court suggested that the welfare of the child is paramount when the parents disagree about religious training.¹⁶⁹ However, if the child's welfare is not at issue, courts are reluctant to interfere in disputes between the parents about religious matters.¹⁷⁰ Here, the trial court had found that it would be detrimental to the children to be exposed to conflicting traditions so it would be in the children's best interests to be raised in the tradition of the custodial parent.¹⁷¹ Because there was "no affirmative showing in the record that it would be detrimental to the well-being of the children to allow the defendant to take them to the Catholic Church or to religious instruction in that faith during the periods of his rights of visitation,"¹⁷² the court struck that part of the order as a "a manifest abuse of discretion."¹⁷³ But this implies that when religious practices are at issue the question is not merely whether exposing the children to multiple practices would be detrimental, but whether the alleged detriment can be attributed to a particular practice.

In *Morris v. Morris*, the divorced parents were of different religions—the mother, who had custody, was Roman Catholic, while the father was a Jehovah's Witness.¹⁷⁴ The mother sought to prevent the father from bringing the child with him when he went door-to-door doing religious solicitation. At trial, a clinical psychologist testified that the child at that age "would tend to

¹⁶⁷ *Id.* at 465.

¹⁶⁸ *Munoz v. Munoz*, 489 P.2d 1133, 1134 (Wash. 1971)

¹⁶⁹ *Id.* at 1134.

¹⁷⁰ *Id.* at 1135.

¹⁷¹ *Id.* at 1134.

¹⁷² *Id.* at 1135. *See also In re Marriage of Murga*, 163 Cal. Rptr. 79, 82 (Cal. Ct. App. 1980):

[W]hile the custodial parent undoubtedly has the right to make ultimate decisions concerning the child's religious upbringing, a court will not enjoin the noncustodial parent from discussing religion with the child or involving the child in his or her religious activities in the absence of a showing that the child will be thereby harmed.

¹⁷³ *Munoz*, 489 P.2d at 1136.

¹⁷⁴ *Morris v. Morris*, 412 A.2d 139, 141 (Pa. Super. Ct. 1979).

adopt her parents' beliefs rather than form her own judgments, and that considerable inconsistency in the former would cause the child to disregard the teaching of either parent."¹⁷⁵ That witness also testified that "door-to-door solicitations would probably. . . result in some psychological impairment."¹⁷⁶

The court noted that "the state of the art in psychiatry is such that absolute certainty is not possible,"¹⁷⁷ and that "the psychiatrist treads in a cryptic area replete with uncertainty."¹⁷⁸ But that very uncertainty was what justified accepting that "the inconsistent teachings would probably result in some mental disorientation,"¹⁷⁹ which allegedly justified the limitations on the father with respect to bringing his child door-to-door.

When upholding the limitation on door-to-door proselytizing, the court explained that the father was "not prohibited from seeing Lisa, nor from discussing his beliefs with her, but only from forcing her to accompany him on his door-to-door visits,"¹⁸⁰ implying that the limitation was rather limited and thus justifiable.¹⁸¹ Further, the court might have cited *Prince* for the proposition that parents can be prohibited from bringing their children along to proselytize.¹⁸² Regrettably, the court failed to appreciate that even limited restrictions must be closely tailored to promoting the state's asserted interest. Permitting the father to discuss his beliefs would allegedly lead to the harm to be averted—the daughter's disregarding the teaching of either parent. But if that is so, then the imposed limitation (prohibiting the door-to-door proselytizing) was not closely tailored to promote the state interest (because the state interest would allegedly be undermined anyway), which would mean that the limitation would likely not pass constitutional muster.

¹⁷⁵ *Id.* at 146.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 147.

¹⁷⁹ *Id.*

¹⁸⁰ *Morris*, 412 A.2d at 147.

¹⁸¹ *See id.* ("The order is, at any rate, quite liberal . . . [and] temporary in nature,") (citing *Friedman v. Friedman*, 307 A.2d 292 (Pa. 1973); *Commonwealth ex rel. Hickey v. Hickey*, 264 A.2d 420 (Pa. 1970)).

¹⁸² *See supra* notes 37-58 and accompanying text (discussing *Prince*).

Proselytizing was at the center of the dispute in *Kirchner v. Caughey*.¹⁸³ At issue was a challenge to an order prohibiting the father from having “the minor child of the parties participate in any church or church-related activity while said minor child is in his care and custody during his visitation periods.”¹⁸⁴

The mother, who had testified that “the child suffered anxiety attacks and had trouble sleeping just prior to scheduled visitations and would come home from visitations crying,”¹⁸⁵ attributed this anxiety to “the child’s participation in certain activities of the father’s church, and to conflicts arising from the ardor with which the father pursued newly-found fundamentalist beliefs in his conversations and dealings with the child.”¹⁸⁶ But a separate question was whether the mother had accurately identified the cause of the anxiety and, if so, what steps might be taken to alleviate that anxiety.

The *Kirchner* court explained that a “factual finding of a causal relationship between the religious practices and the actual or probable harm to a child is required—mere conclusions and speculations will not suffice.”¹⁸⁷ After announcing this demanding standard, the court seemed to undermine the very standard that it had announced.

A psychiatrist had testified that “the proselytizing by the father and the direct involvement by the child in his efforts to convert others [was] . . . particularly harmful to the child,”¹⁸⁸ although that harm had to be put in context. The expert had testified that religion was not the primary issue; instead, the parents had different views of what was “right” and what was “wrong.”¹⁸⁹ For example, the father had criticized the daughter’s bathing suit as immodest and had objected to her listening to rock and roll.¹⁹⁰ Yet, it was not clear that prohibiting the father from including the child in religious activities would resolve the conflict felt by the child in light of the parents’ differing world views—even if the

183 606 A.2d 257 (Md. 1992).

184 *Id.* at 259.

185 *Id.* at 260.

186 *Id.* at 260–61.

187 *Id.* at 262 (citing *Khalsa*, 751 P.2d at 720).

188 *Id.* at 263.

189 *Kirchner*, 606 A.2d at 264.

190 *Id.*

child was precluded from attending the “non-denominational”¹⁹¹ Sunday school classes at the father’s church, the child would likely still feel torn. But this might well mean that the focus on limiting religious activities would not pass muster, because other practices were being permitted, notwithstanding their promoting what the State wished to prevent.

IV. Conclusion

Children who are placed in the middle of their divorced parent’s conflicts may suffer ill effects.¹⁹² Understandably, state courts wish to minimize the ill effects that children experience when their parents strongly disagree about certain matters including religious ones. Yet, the noncustodial parent’s right to instruct his or her child on religious matters is protected as a constitutional matter and recent decisions suggest that this protection is quite robust.

Courts that impose limitations on religious instruction must establish that these limitations are the least restrictive means to promoting a compelling state interest,¹⁹³ and courts often fail to establish that the chosen means is sufficiently closely tailored.¹⁹⁴ The U.S. Supreme Court is likely to view limitations on religious instruction with a jaundiced eye if secular expression is not similarly limited.¹⁹⁵ Further, the Court is unlikely to uphold limita-

¹⁹¹ *Id.* at 263.

¹⁹² Robert E. Emery, *Foreword*, 10 VA. J. SOC. POL’Y & L. 1, 3 (2002) (“For children, . . . one of the worst things about divorce [is] getting caught in the middle between your warring parents.”); Gregory Firestone & Janet Weinstein, *In the Best Interests of Children A Proposal to Transform the Adversarial System*, 42 FAM. CT. REV. 203, 204 (2004) (“[O]ne of the most consistently reported findings of divorce research involves the toxic effect on children caught in the middle of ongoing conflict of their parents.”); Sol R. Rappaport, *Deconstructing the Impact of Divorce on Children*, 47 FAM. L.Q. 353, 364 (2013) (“[P]arental conflict pre-and post-divorce that puts the children in the middle increases the likelihood that a child will have post-divorce adjustment difficulties.”).

¹⁹³ *See Tandon*, 141 S. Ct. at 1296.

¹⁹⁴ *Id.*, at 1296-97 (“narrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest”).

¹⁹⁵ *Id.* at 1296 (“[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause,

tions on religious instruction if those limitations are unlikely to achieve the state goal, e.g., if the child is still going to undergo stress and anxiety because the child still feels forced to choose sides.

When striking down the restrictions on religious instruction, the Court will likely accept that the State has a compelling interest in preventing harm to children. However, the Court's free exercise jurisprudence has focused increasingly closely on the means adopted, and has made clear that secular activity can never be favored over religious activity.

Religious activity cannot be prohibited where *comparable* secular activity is permitted,¹⁹⁶ so an important issue will involve which secular activities are comparable. The Court has been relatively deferential with respect to which secular activities are comparable to religious activities for these purposes,¹⁹⁷ which means that states will have great difficulty in making sure both that their restrictions are not overbroad and that comparable secular teaching is not permitted while religious teaching is prohibited. While the determination of which limitations are permissible will have to be worked out in the courts, the Court has set up a very daunting standard. Many of the current state approaches will likely have to be revised, even if that results in children's welfare being diminished.

whenever they treat *any* comparable secular activity more favorably than religious exercise.”).

¹⁹⁶ *Cf. Tandon*, 141 S. Ct. at 1298 (Kagan, J., dissenting) (“California need not, as the *per curiam* insists, treat at-home religious gatherings the same as hardware stores and hair salons . . . the law does not require that the State equally treat apples and watermelons.”).

¹⁹⁷ *See supra* note 192 and accompanying text.