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In the System: Facilitating the Reunification of the Child and the Parents Through Religion

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NOTE

IN THE SYSTEM: FACILITATING THE REUNIFICATION OF THE CHILD AND THE PARENTS THROUGH RELIGION

I. INTRODUCTION

In 2004, a child named Ahmed was born to Muslim parents.[1] When Ahmed was eighteen months old, he was removed from his home and New Jersey's Department of Youth and Family Services ("Department") took custody of him.[2] Although the Department had a provision in its administrative code that required the foster child to be "afforded the opportunity to attend religious activities and services" in accordance with his biological parents' faith, Ahmed was not allowed to attend services at a mosque and neither the Department nor Ahmed's foster parents abided by the religious dietary restrictions of the Muslim faith.[3] Ultimately, the child's Muslim name was changed to a Christian name, and his parents lost their parental rights in 2010, never regaining custody of Ahmed.[4]

Ahmed's story illustrates the conflict between the religious beliefs of a foster child and his foster parents that can occur in a foster home after the child's placement. Under the First Amendment, the government is restrained from establishing religion and placing an undue burden on an individual's free exercise of religion.[5] The court generally does not play an active role in the relationship between the parents and the child because the relationship occurs within private homes.[6] When children

1. Aref Assaf, *State Must Preserve the Faith Traditions of Foster Care Children*, NJ.COM (Dec. 13 2011, 5:41 PM), http://blog.nj.com/dr_aref_assaf/2011/09/troubled_childrens_religion_matters.html.

2. *Id.*

3. *Id.*

4. *Id.*

5. *See* U.S. CONST. amend. I.

6. *See* James. A. Cosby, *Re-examining the Parent-Child-State Relationship*, 11 KAN. J.L. & PUB. POL'Y 723, 724-25 (2002) (discussing the "iron-clad" rules that the Supreme Court has developed to protect "traditional notions of *parental autonomy*"); Susan E. Lawrence, *Substantive Due Process and Parental Rights: From* Meyer v. Nebraska *to* Troxel v. Granville, 8 J.L. & FAM.

enter foster care, however, the child is under the temporary supervision of the state, and consequently, the state plays a more active role in the relationship between the parents and the child.[7] While the child is under state supervision, the state is granted discretion to determine if a termination of parental rights is in the best interests of the child.[8] However, states are required to file a petition for the termination of parental rights if the child has been in foster care for fifteen of the most recent twenty-two months.[9] Generally, when the state terminates the parents' rights, the child becomes eligible for adoption by either the foster parents currently caring for the child or a different family seeking to adopt a child.[10] The state, however, may decide not to terminate parental rights if the child is under the care of a relative, if the state can show that filing a termination of parental rights petition is not in the best

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STUD. 71, 88-95 (2006) (discussing the scope of the Supreme Court's involvement in the parent-child relationship).

7. *See, e.g.*, 42 U.S.C. § 675(5)(C) (2006 & Supp. V 2012) (discussing the state's role in determination and continuation of foster care placement as well as the termination of parental rights).

8. DEBRA RATTERMAN BAKER ET AL., MAKING SENSE OF THE ASFA REGULATIONS: A ROADMAP FOR EFFECTIVE IMPLEMENTATION 13 (Diane Boyd Rauber ed., 2001) [hereinafter MAKING SENSE OF THE ASFA REGULATIONS]. There are various factors that go into determining whether termination of parental rights is in the best interest of the child. *See id.* For instance, in some cases, before terminating parental rights, the court will consider kinship placement, and how that may be an important factor in delaying or preventing termination. *See* Leah C. Schwartz, Case Note, *Blood as Best Interests: The Wyoming Supreme Court Expands Associational Rights and the Preference for Kinship Placement;* In re JW, *226 P.3d 873 (Wyo. 2010)*, 11 WYO. L. REV. 549, 570-76 (2011) (discussing Wyoming's statutory preference for kinship placement); *see also In re* JW, 226 P.3d 873, 881 (Wyo. 2010). In other cases, factors such as a parent's use of a controlled substance is a statutory factor in determining if parental rights will be terminated. *See* Ian Vandewalker, Note, *Taking the Baby Before It's Born: Termination of the Parental Rights of Women Who Use Illegal Drugs While Pregnant*, 32 N.Y.U. REV. L. & SOC. CHANGE 423, 426-27 (discussing how Florida's child welfare statutes allows parental drug use to be considered with respect to a termination of parental rights).

9. 42 U.S.C. § 675(5)(E) (2006 & Supp. 2012); 45 C.F.R. § 1356.21(i)(1)(i) (2012). Scholars have criticized the requirement to file a petition for termination of parental rights when the child has been in foster care for fifteen of the most recent twenty-two months because such a requirement may seem unfair in certain circumstances, such as when a parent is incarcerated. *See* Deseriee Kennedy, *"The Good Mother": Mothering, Feminism, and Incarceration*, 18 WM. & MARY J. WOMEN & L. 161, 171 (2012) (discussing the consequences of long-term incarceration as it relates to child welfare); Steven Fleischer, Note, *Termination of Parental Rights: An Additional Sentence for Incarcerated Parents*, 29 SETON HALL L. REV. 312, 327 (1998) (noting that some states, through statutes, allow for parental rights to be terminated based upon the duration of a parent's incarceration); Sarah Freeman, Note, *Ensuring Effective Counsel for Parents: Extending* Padilla *to Termination of Parental Rights Proceedings*, 42 HOFSTRA L. REV. 303, 318-23 (2013) (discussing the insufficient legal protections for parents facing termination of parental rights). When termination of parental rights is conditioned upon the duration of the parent's incarceration, the state is allowed to sever the parent-child relationship, regardless of evidence that the incarcerated parent is rehabilitated and able to play a positive role in his child's life. *See* Fleischer, *supra*, at 329.

10. *See* 42 U.S.C. § 675(5)(E)(i)–(iii).

interests of the child, or if there is a judicial finding that the state did not provide the parents and the child with sufficient services to enable the family to be reunited.[11] If a judicial finding is made, the child will remain in the foster care system, and parents will retain their parental rights until there is a judicial decision to terminate those rights, or until there is a decision that it is in the best interests of the child to return to his parents.[12] In few states, after parental rights have been terminated, if permanent placement has not been achieved, and if certain statutory criteria are met, then a petition can be filed requesting the reinstatement of parental rights.[13]

Because parental rights are not terminated until the state child protection agency initiates and concludes a judicial proceeding for the termination of parental rights, parents should still be afforded a greater level of protection when it comes to the religious activity of their children while in foster care.[14] The important role of religion in child rearing is illustrated when courts sometimes consider the religious upbringing of children in custody cases if the parties raise the issue.[15] Scholars have noted that religion needs to be considered in the context of foster care as well.[16] Studies show that increased observance of religious

11. *Id.*

12. *See id.*

13. *E.g.*, CAL. WELF. & INST. CODE § 366.26(h)(3)(C)(i)(2) (West 2008) ("A child who has not been adopted after the passage of at least three years from the date the court terminated parental rights and for whom the court has determined that adoption is no longer the permanent plan may petition the juvenile court to reinstate parental rights."); HAW. REV. STAT. § 587A-34(a) (2012) ("A child who is subject to an active proceeding under this chapter, the child's guardian ad litem, the child's attorney, if any, or the department, may file a motion to reinstate the terminated parental rights of the child's parents in a proceeding under this chapter . . . ."); 705 ILL. COMP. STAT. ANN. 405/2-34(1) (West 2007 & Supp. 2013) ("A motion to reinstate parental rights may be filed only by the Department of Children and Family Services regarding any minor who is presently a ward of the court under Article II of this Act when all the conditions . . . are met.").

14. *See* 42 U.S.C. § 675(5)(E)(i)–(iii); *see also* discussion *infra* Part II.

15. *See, e.g.*, *In re* Kurowski, 20 A.3d 306, 321 (N.H. 2011) (holding that a parent's religious training of a child can only be restricted if substantial evidence shows that the child's welfare was jeopardized); *see also, e.g.*, Feldman v. Feldman, 874 A.2d 606, 607-08 (N.J. Super. Ct. App. Div. 2005) (holding that, where a primary caretaker has sole authority over religious upbringing of children, the secondary caretaker is not barred from exposing children to religious services or holidays); S.E.L. v. J.W.W., 541 N.Y.S.2d 675, 676, 680 (N.Y. Fam. Ct. 1989) (holding that, while a custodial parent has the right to determine a child's religious upbringing, a non-custodial parent can be prohibited from instructing a child in a different religion when the religious practices cause the child harm).

16. *See, e.g.*, Terrence D. Hill et al., *Religious Involvement and Attitudes Toward Parenting Among Low-Income Urban Women*, 29 J. FAM. ISSUES 882, 896-97 (2008) (noting that increased religious participation is linked with better parenting); Jill Schreiber, Univ. of Ill. Urbana/Champaign, The Role of Religion in Foster Care (Nov. 2010), http://www.nacsw.org/Publications/Proceedings2010/SchreiberJThe%20Role.pdf.

values creates better chances for improved outcomes for adolescents.[17] In fact, scholars support the idea that unified religious beliefs between children and their parents can even create a more cohesive relationship between parents and their children, which may be something that is desirable in a child welfare case.[18]

Many state legislatures have either tried to pass or have passed legislation to prevent courts from applying Sharia law or international law to court decisions.[19] As of May 2011, more than half of the states—including Alaska, Arizona, Arkansas, Georgia, Indiana, Louisiana, Mississippi, Nebraska, South Carolina, South Dakota, Texas, Utah, and Wyoming—have either proposed or adopted bills or state constitutional amendments to prevent state courts from using international law in court decisions.[20] Most recently, Kansas's legislators banned foreign law from being used in judicial decisions in Kansas state courts.[21] Although courts have not reached a decision on the merits of a challenge to a law banning the use of Sharia law in state courts, at least one court has held that an individual can have standing to sue over legislation banning Sharia law because the law would expose Muslims to disfavored treatment.[22] Laws like this are a result of an Anti-Sharia Movement that has portrayed Sharia law as a threat to American values and freedom.[23] This kind of proposed legislation has the potential to limit the rights of Muslims in America, including the rights of Muslim children in foster care.[24] As the hostility towards Sharia law and international law grows, the religious beliefs of all foster children and their parents are put into jeopardy.[25]

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17. *See, e.g.*, Rachel Elizabeth Dew et al., *Religion/Spirituality and Adolescent Psychiatric Symptoms*, CHILD PSYCHIATRY & HUM. DEV. 381, 388 (2008) (noting evidence linking greater religious participation to lower levels of substance use); Hill et al., *supra* note 16, at 896-97.

18. *See, e.g.*, Annette Mahoney, *Religion and Conflict in Marital and Parent-Child Relationships*, 61 J. SOC. ISSUES 689, 690-91 (2005).

19. Jamilah King, *13 States Introduce Useless Bills to Ban Sharia Law*, COLORLINES: NEWS FOR ACTION (Feb. 9, 2011), http://colorlines.com/archives/2011/02/13_states_introduce_bills_to_ban_sharia_law.html.

20. Aaron Fellmeth, *International Law and Foreign Law in the U.S. State Legislatures*, AM. SOC'Y OF INT'L L. (May 26, 2011), http://www.asil.org/sites/default/files/insight110526.pdf; King, *supra* note 19.

21. John Celock, *Sharia Law: Kansas Lawmakers Pass Ban*, HUFFINGTON POST (May 11, 2012, 6:24 PM), http://www.huffingtonpost.com/2012/05/11/sharia-law-kansas-ban_n_1510773.html.

22. *See* Awad v. Ziriax, 670 F.3d 1111, 1123 (10th Cir. 2012).

23. Andrea Elliot, *Behind an Anti-Shariah Push*, N.Y. TIMES, July 31, 2011, at A1 (discussing various viewpoints on whether Sharia law is a threat to American values).

24. *See Awad*, 670 F.3d at 1123 (suggesting that Muslims have standing because they are injured by laws that prohibit the use of Sharia law in judicial proceedings).

25. *See id.* (suggesting that Muslims are injured by laws that prohibit consideration of Sharia law in judicial proceedings); Asma T. Uddin & Dave Pantzer, *A First Amendment Analysis of Anti-Sharia Initiatives*, 10 FIRST AMENDMENT L. REV. 363, 369 (2012) (discussing the viewpoint that

However, providing a federal or state solution to help protect these beliefs can provide Muslim children in foster care, as well as non-Muslim children, shelter from the growing hostility.[26] While this Note recognizes a growing hostility within the United States towards Sharia law,[27] it suggests a solution that can be applied generally to help protect the religious rights of all children in the foster care system.[28]

When children are placed into foster care, the state is obligated to create a plan to provide for the best interests of the child and make reasonable attempts to reunify the biological parents and the child.[29] This Note considers the question of how foster care agencies can best protect the religious freedoms of both children in the foster care system and their biological parents.[30] Part II considers the origins of the foster care system and the role it plays in rehabilitating parent-child relationships during the reunification of families that were divided due to voluntarily or involuntary placement.[31] Part III shows the evolution of the Free Exercise Clause and the Establishment Clause (collectively, the "Religion Clauses" or "Clauses") of the Constitution, and how the Supreme Court has attempted to reconcile them and create a workable standard to determine when they have been violated.[32] Part IV argues that the religious freedom of the foster child and of his parents is unprotected by current federal and state legislative schemes.[33] Although many states provide for religious considerations before the child enters foster care, there are no safeguards to protect those religious beliefs while the child remains there, and biological parents do not have a viable way to challenge agencies or foster parents when they object to the religious upbringing of the fostered child.[34] Part V suggests both a federal spending program and a state regulatory program to provide for protections of religion after the child is placed in a foster home.[35] Part VI concludes, however, that in light of the United States' history of separation of church and state, along with other objections to greater federal involvement in foster care administration, a state regulatory

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Sharia law is generally incompatible with American values).

26. *See infra* Part V.
27. *See supra* notes 23, 25 and accompanying text.
28. *See infra* Part V.
29. 42 U.S.C. § 671(a) (2006 & Supp. V 2012).
30. *See infra* Part V.
31. *See infra* Part II.
32. *See infra* Part III.
33. *See infra* Part IV.
34. *See* discussion *infra* Part IV.
35. *See infra* Part V.

program would ultimately be the best, most plausible solution to address post-placement religious conflicts in foster homes.[36]

II. FOSTER CARE HISTORICALLY

This Part discusses the purposes of the foster care system and how social welfare workers serve families while their children are in the child welfare system. While the foster care system was initially developed to prosecute parents for abusing their children, it later developed into an association that provides services to parents and their children.[37] While Subpart A discusses the evolution of the child welfare system,[38] Subpart B explains how foster care agencies are required by law to promote the reunification of the parents and the child and gives examples of two instances—voluntary placement agreements and permanency planning—in which the agency has the opportunity to work with biological parents to return the child to his parents.[39] Since 1997, federal law has provided that a child protection agency must provide reasonable efforts to preserve the unity of the family by providing services to eliminate the need for the removal of the child.[40] Subpart C will address the differences between court interpretations of the substantive due process rights of biological or adoptive parents and foster parents.[41] Historically, the Supreme Court has held that parents have a liberty interest in raising their children, and that there are some laws that are unconstitutional because they infringe upon a fundamental liberty interest under the Fourteenth Amendment.[42] While it has been recognized that the liberty interest of biological parents is fundamental, the Court has noted that foster parents, even those who are the prospective adoptive parents for the child, only have an identifiable liberty interest when a statute provides one.[43] Thus, biological or adoptive parental rights are more

36. *See infra* Part VI.

37. Brenda G. McGowan, *Historical Evolution of Child Welfare Services*, *in* CHILD WELFARE FOR THE TWENTY-FIRST CENTURY 10, 17 (Gerald P. Mallon & Peg McCartt Hess eds., 2005).

38. *See infra* Part II.A.

39. *See infra* Part II.B.

40. Adoption and Safe Families Act, Pub. L. No. 105-89, § 101, 111 Stat. 2115 (1997) (codified as amended at 42 U.S.C. § 671(a)(15)(B) (2006)).

41. *See infra* Part II.C.

42. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 66-67 (2000); Santosky v. Kramer, 455 U.S. 745, 753 (1982) ("[F]reedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment."); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 401 (1923).

43. *Compare Troxel*, 530 U.S. at 66 (holding that a mother had a fundamental right to rear her children in the manner she chose), *with* Rodriguez v. McLoughlin, 214 F.3d 328, 334-35 (2d Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001) (citing Rodriguez v. McLoughlin, 49 F. Supp. 2d 186, 196 (S.D.N.Y. 1999) (stating that a liberty interest was only recognized in a "discretely identifiable

extensive than foster parental rights, and foster parents will only gain additional rights if a statute provides for them.[44]

A. The Origins and the Purpose of the Foster Care System

Since 2007, over 400,000 children were reported to have been in foster care each year.[45] Of these children, approximately half exited foster care within the fiscal year of 2011.[46] In 2011, approximately 199,000 foster care children had permanency case goals to reunify with their parents or principal caretakers.[47] Research by the Adoption and Foster Care Analysis and Reporting System shows that, in 2011, an estimated 125,900 children exited foster care because they were reunified with their parents or primary caretakers.[48] These estimates show that there were state agencies that succeeded in making reasonable efforts to reunify the parents and the child, as provided for by federal law.[49]

Historically, states legislators believed that society should play a greater role in state intervention on behalf of children.[50] Because early organizations focused on prosecuting parents for child abuse, they were not concerned with providing preventive services to children and their families.[51] Later, child welfare service agencies expanded in-home services to be able to care for children in their own homes, while providing public assistance for the child and his family.[52] Modern child welfare laws show that legislatures continue to require child

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set of foster parents" who met particular statutory criteria)).

44. *Rodriquez*, 214 F.3d at 334-35, 341.

45. *See* ADMIN. FOR CHILDREN AND FAMILIES, U.S. DEP'T OF HEALTH AND HUMAN SERVS., THE AFCARS REPORT (2012) [hereinafter THE AFCARS REPORT], *available at* http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport19.pdf. This number is substantially higher than the number of children that were in foster care system in 1982. *See Vital Statistics: State of the Child*, U.S. NEWS & WORLD REP., Apr. 30, 2001, at 12 (indicating that there were 262,000 children in foster care in 1982); Jim Moye & Roberta Rinker, *It's a Hard Knock Life: Does the Adoption and Safe Families Act of 1997 Adequately Address Problems in the Child Welfare System?*, 39 HARV. J. ON LEGIS. 375, 376 (2002). Notably, however, the number of children in foster care each year has been steadily decreasing. *See* THE AFCARS REPORT, *supra*.

46. THE AFCARS REPORT, *supra* note 45.

47. *Id.*

48. *Id.*

49. *Compare id.* (showing that 125,900 children exited foster care because they were reunited with their parents or primary caretakers), *with* 42 U.S.C. § 671(a)(15)(B) (2006) (requiring state agencies to make reasonable efforts to preserve and unify families).

50. *See* McGowan, *supra* note 37, at 16 (noting that, after the founding of the New York Society for the Prevention of Cruelty to Children in 1984, similar societies were quickly created in other parts of the country).

51. *Id.* at 17.

52. *Id.* at 23.

welfare agencies to work with families so that children can remain in their homes.[53]

Researchers have found that helping to provide services to families and engaging with clients are fundamental to the child welfare system.[54] The Adoption and Safe Families Act of 1997 ("ASFA")[55] provides a limited time frame for decisions about termination of parental rights and permanency planning.[56] The limited time frame pushes caseworkers to make quick decisions about permanency for the child.[57] Therefore, establishing a relationship with families quickly is essential to ensure the protection of the child and to create proper permanency goals.[58]

B. Working with Biological Parents

Federal laws allow for parents to voluntarily place their children into foster care for up to six months without court review or state judicial determination that the child remaining in the home would not be beneficial to his welfare.[59] In order for a placement to be considered voluntary, the parents of the child must request the assistance of the agency, and must sign a voluntary placement agreement, which binds the state agency and the parents or guardians with respect to the "legal status of the child and the rights and obligations of the parents or guardians, the child, and the agency while the child is in placement."[60] A state can have a voluntary placement agreement for a child, which allows the parents to

53. *See* 42 U.S.C. § 671(a)(15)(B). Section 671(a)(15)(B) states that "[r]easonable efforts shall be made to preserve and reunify families." *Id.* These efforts must be made either before the child is placed in foster care in order to prevent or eliminate the need for removal of the child from his home, or while the child is in foster care placement to create an environment in which the child can safely return to his home. *Id.*

54. Julie C. Altman, *Engagement in Children, Youth, and Family Service*, *in* CHILD WELFARE FOR THE TWENTY-FIRST CENTURY 72, 72, 74-75 (Gerald P. Mallon & Peg McCartt Hess eds., 2005).

55. Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.).

56. *Id.* § 103 (codified as amended at 42 U.S.C. § 675(5)(E)) (requiring state agencies to file a petition for termination of parental rights where the child has been in foster care for fifteen of the most recent twenty-two months). ASFA was passed in 1997 with the goal of correcting many deficiencies in the child welfare system. Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.). State and federal courts must comply with the requirements of ASFA, and all inconsistent state laws are superseded by ASFA. MAKING SENSE OF THE ASFA REGULATIONS, *supra* note 8, at 3-4.

57. *See* Altman, *supra* note 54, at 72.

58. *See id.* at 75.

59. 42 U.S.C. § 672(a)(2)(A); *see* Emily Buss, *Parents' Rights and Parents Wronged*, 57 OHIO ST. L.J. 431, 434 (1996).

60. 42 U.S.C. § 672(f).

retain custody as long as the state is responsible for the day-to-day care of the child.[61]

Voluntary placement agreements have been widely criticized.[62] Scholars see them as the state's attempt to convince parents to volunteer to place their children in foster care out of fear that if they do not, they will be seen as uncooperative in future court proceedings.[63] Scholars have labeled voluntary placement agreements as "fictional" since the parents put their children in placement because they are threatened with neglect proceedings.[64] Voluntary placement agreements are criticized because when parents sign them, they can either waive or delay right to counsel, judicial review of reasons for separation, and sometimes even the right for planning for reunification with their child.[65] These delays and waivers then make it more difficult for parents to get their children back from a foster care placement.[66]

Under ASFA, states are required to have a permanency goal for each child in foster care.[67] This law requires a dispositional hearing to occur within twelve months from the date the child is considered to have entered the foster care system.[68] Accordingly, many states have passed statutes that delineate time frames for when permanency hearings must take place and what agencies are required to do based on the permanency goal created for each child.[69] Permanency planning involves

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61. *See id.* § 672(a)(2)(B), (f) (describing a relationship where the child is in foster care placement, and the state and the child's parents have a written agreement with regard to rights and obligations of both the state and the parents).

62. *See, e.g.*, Buss, *supra* note 59, at 434 (arguing that voluntary placement agreements essentially leave parents with no option but to voluntarily place their children in foster care to avoid facing other consequences); Soledad A. McGrath, *Differential Response in Child Protection Services: Perpetuating the Illusion of Voluntariness*, 42 U. MEM. L. REV. 629, 671-72 (2012) (arguing that the voluntariness of voluntary placement agreements is just an illusion). The argument that voluntary placement agreements tend to coerce parents into placing their children in foster care is not new. *See generally* Robert H. Mnookin, *Foster Care—In Whose Best Interest?*, 43 HARV. EDUC. REV. 599 (1973) (discussing the features of voluntary placement agreements that pressure parents into placing their children into foster care). Such arguments recognize that the standards for removing a child from his home and placing him in foster care fail to give adequate weight to parental interests in the matter. *See id.* at 614-15.

63. Buss, *supra* note 59, at 434; McGrath, *supra* note 62, at 670.

64. *See* McGrath, *supra* note 62, at 670-71; Katherine C. Pearson, *Cooperate or We'll Take Your Child: The Parents' Fictional Voluntary Separation Decision and a Proposal for Change*, 65 TENN. L. REV. 835, 837 (1998).

65. McGrath, *supra* note 62, at 670, 676-77; Pearson, *supra* note 64, at 840.

66. *See* McGrath, *supra* note 62, at 671; Pearson, *supra* note 64, at 841.

67. 42 U.S.C. § 675(1)(A)–(B) (2006).

68. *Id.* § 675(5)(C).

69. *E.g.*, ARIZ. REV. STAT. ANN. § 8-862 (2007 & Supp. 2013); N.M. STAT. ANN. § 32A-4-25.1 (2013); S.C. CODE ANN. § 63-7-1700 (2010 & Supp. 2012). For example, according to the South Carolina statute:

> The family court shall review the status of a child placed in foster care upon motion filed

the agency working with the family to make a goal for the permanent placement of the child.[70] While permanency planning helps the judge become aware of the agency's progress, it is also a way for caseworkers to develop goals for each child and his parents and to create a plan according to those goals.[71]

Generally, foster care agencies train caseworkers to create family service plans, ensure that the foster child has a stable and permanent home, identify parenting problems that created the need for foster care placement for the child, and provide services to both the parents and the child to promote reunification.[72] In seeking permanency for a child, foster agencies must first seek to reunify the child with his biological parents.[73] If reunification with biological parents cannot be achieved, the agency can have a permanency goal of adoption or legal guardianship, or a plan for long-term foster care placement for the child.[74] It is important that the state show that it attempted to prevent the removal of the child or that it attempted to reunify the biological parents and the child before adoption can be considered.[75] Because ASFA shows a clear preference for reunification with the biological parents, states should make reasonable efforts to reunify the parents and the child by protecting the religious activities of children in foster care.[76] If a foster family does not acknowledge the child's religiously important practices, and puts the religious beliefs of the child in jeopardy, this may negatively impact the ability of the child and the parents to be reunited.[77]

> by the department to determine a permanent plan for the child. The permanency planning hearing must be held no later than one year after the date the child was first placed in foster care. At the initial permanency planning hearing, the court shall review the status of the child and the progress being made toward the child's return home or toward any other permanent plan approved at the removal hearing. The court's order shall make specific findings in accordance with this section.

S.C. CODE ANN. § 63-7-1700(A).

70. *See* David J. Herring, *Exploring the Political Roles of the Family: Justifications for Permanency Planning for Children*, 26 LOY. U. CHI. L.J. 183, 186-87 (1995).

71. *See id.* at 186.

72. *Id.*

73. *See id.* at 186-87.

74. *Id.* (stating that reunification with biological parents is the preferred placement plan while adoption and formally planned long-term foster care is less preferred).

75. *See* 42 U.S.C. § 671(a)(26)(A)(i)(II) (2006). Section 671(a)(26)(A)(i)(II) states:

> Within 60 days after the State received from another State a request to conduct a study of a home environment for purposes of assessing the safety and suitability of placing a child in the home, the State shall, directly or by contract return to the other State a report on the results of the study, which shall address the extent to which placement in the home would meet the needs of the child.

Id.

76. *See id.*; Herring, *supra* note 70, at 186-87.

77. *See* Schreiber, *supra* note 16 (discussing the positive correlation between religiosity of

ASFA also provides that "procedural safeguards shall be applied with respect to parental rights pertaining to the removal of the child from the home of his parents, to a change in the child's placement, and to any determination affecting visitation privileges of parents."[78] However, there is little detail or further regulatory guidance provided about what these "procedural safeguards" are.[79] Therefore, agencies are left to make these determinations on their own.[80]

C. Due Process Rights of Biological Parents and Foster Parents

Furthermore, the religious rights of foster children should be protected because biological parents have a broader set of rights concerning the child than foster parents.[81] At a minimum, ASFA suggests that states must afford foster parents and parents in the process of adopting the child, also known as preadoptive parents, "notice of, and a right to be heard in, any proceeding with respect to the child."[82] The law is clear that this guarantee of notice and a right to be heard does not make foster parents or preadoptive parents parties to those proceedings concerning the child.[83]

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children and their parents).

78. 42 U.S.C. § 675(5)(c)(ii).

79. *See* 45 C.F.R § 1355.21, .25, .33 (2012); Josh Gupta-Kagan, *Filling the Due Process Donut Hole: Abuse and Neglect Cases Between Disposition and Permanency*, 10 CONN. PUB. INT. L.J. 13, 18-19 (2010).

80. *Cf.* 45 C.F.R. §§ 1355–1356 (mentioning procedural safeguards without giving examples or a definition of what sufficient procedural safeguards might be).

81. *See* Rodriguez v. McLoughlin, 214 F.3d 328, 334-35 (2000), *cert. denied*, 532 U.S. 1051 (2001) (citing Rodriguez v. McLoughlin, F. Supp. 2d 186, 196 (S.D.N.Y. 1999)). In *Rodriguez*, the Second Circuit held that "a statute that merely establishes procedural requirements does not thereby create a liberty interest." *Id.* at 339. For a discussion of the impact, scope, and limitations of *Rodriguez*, see generally Katherine S. Wilson, Comment, *Not Quite a Family: The Second Circuit Decides Against Recognizing Procedural Due Process Rights for a Pre-Adoptive Foster Family in* Rodriguez v. McLoughlin, 67 BROOK. L. REV. 899 (2002).

82. 42 U.S.C. § 675(5)(G) (Supp. V 2012). *But see* Wilson, *supra* note 81, at 923-24 (suggesting that, in certain cases, the court should take into consideration other factors, such as: "(1) the presence of substantial psychological ties in the absence of a biological parent; (2) the permanency of [the child's] foster care relationship; and (3) the importance of [the foster mother's] entering into an Adoptive Placement Agreement with the state for the adoption of [the child]" (internal quotation marks omitted)).

83. 42 U.S.C. § 675(5)(G). Federal law provides that a proper case review system, as defined by the U.S. Code, ensures that:

> [T]he foster parents (if any) of a child and any preadoptive parent or relative providing care for the child are provided with notice of, and a right to be heard in, any proceeding to be held with respect to the child except that this subparagraph shall not be construed to require that any foster parent, preadoptive parent, or relative providing care for the child be made a party to such a proceeding solely on the basis of such notice and right to be heard.

Id.

In *Troxel v. Granville*,[84] the Supreme Court held that a statute that provided for any person to petition for visitation at any time violated the substantive due process rights of the child's mother.[85] *Troxel* involved two parents who had never married.[86] The parents had two children, and after the father committed suicide, the mother decided to limit the children's visitation with their paternal grandparents to one visit a month.[87] The paternal grandparents sought to gain greater visitation rights by filing a petition under a state statute that provided that any person could petition the court at any time for visitation rights, and that the court had the power to order visitation that would be in the best interest of the child.[88] The Court found that this statute was unconstitutional because it violated the substantive due process rights of the mother, who had a fundamental right to rear her children.[89] The Court came to this conclusion after an extensive look at the American tradition of the Court's hesitance to interfere with the role of the parents in the upbringing of their children.[90] The Court's decision in *Troxel* emphasized the importance of noninterference with natural parental rights.[91] While foster care placement may remove basic natural parental rights, like physical custody of the child, it is clear that all parental rights are not transferred to foster parents when the child is placed with them.[92]

In fact, the Supreme Court has accepted that foster parent and preadoptive parental rights are not as extensive as the rights of adoptive or biological parents.[93] Most of the rights of foster or preadoptive parents solely concern rights to notification of service plans for the child, rights to notifications of judicial decisions concerning the child, and rights to receive timely hearings concerning the placement of children in their home.[94] In *Rodriguez v. McLoughlin*,[95] a four-year-old foster child had limited contact with his biological mother, and the child welfare

84. 530 U.S. 57 (2000).

85. *Id.* at 61, 75.

86. *Id.* at 60.

87. *Id.* at 60-61.

88. *Id.* at 61.

89. *Id.* at 72-73.

90. *Id.* at 65-66.

91. *See id.* at 72-73. *But see* Emily Buss, *Adrift in the Middle: Parental Rights After* Troxel v. Granville, 2000 SUP. CT. REV. 279, 282-83, 296-98 (discussing the Court's opinion in *Troxel* and suggesting an alternative test for states to abide by when confronted with the conflict between parental rights and state interest).

92. *See* Rodriguez v. McLoughlin, 214 F.3d 328, 334-35 (2d Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001).

93. *See id.*

94. *See, e.g.*, OKLA. STAT. ANN. tit. 10A § 1-9-119 (West 2009).

95. 214 F.3d 328 (2d Cir. 2000).

agency and the child's social worker had decided that it would be in the child's best interest for the child to be adopted.[96] The child's social worker entered into an adoptive placement agreement with the foster mother in which the foster mother agreed to keep the child in her home with the intention of adopting him.[97] The child welfare agency removed the child from his foster home because they discovered that he and another foster child, who was three years old, were being supervised by a twelve-year-old, "emotionally handicapped, special education" child.[98]

The child's foster mother claimed a violation of substantive due process rights because when the child was removed and transferred to a new foster home, the foster mother was (1) denied visitation with the child while he was out of her care, and (2) denied notice that the child welfare agency sought independent review of the determination that it was maltreatment to allow the child to be supervised by the twelve-year-old child.[99] In response to the foster parent's claim that her substantive due process rights were violated, the Court was clear that the only rights that she had to the child had to be provided for statutorily.[100] In that case, because the child welfare agency was in New York, the foster parent only had a liberty interest in three limited instances that were provided for by statute.[101] New York did not have a statute that gave foster parents the right to change a foster child's religion while the child was in care.[102] In fact, no state statutorily provides for foster parents to have a right to change the religious denomination of a child in their care.[103] This can be attributed to the general historical notion that biological parents have a great deal of freedom from state intervention in educating their children.[104]

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96. *Id.* at 331.

97. *Id.*

98. *Id.* at 332.

99. *Id.* at 332-33.

100. *Id.* at 339-40.

101. *Id.* at 334 (citing Rodriguez v. McLoughlin, F. Supp. 2d 186, 196 (S.D.N.Y. 1999)). Foster parents in New York have the right to notice of proceedings involving the child's status when they have had custody for more than twelve continuous months. *Id.* Foster parents also have priority over others when it comes to the child's adoption, and are eligible for an adoption subsidy when the child has been in their care for over eighteen months. *Id.*

102. *See id.* at 339-40 (discussing the rights that New York state law provides to foster parents).

103. *But see, e.g.*, Assemb. 4353, 214th Leg. (N.J. 2011) (proposing that a child's religion is not to be changed when the child enters foster care or when the child is adopted); Assaf, *supra* note 1 (discussing the possible impact that proposed legislation in New Jersey would have on the rights of children in foster care).

104. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 400-01 (1923). It should be noted that the Court has never held that a parent's rights to direct the education of his child is a fundamental right; however, the failure to do so may be to prevent

Courts have even noted that child welfare systems are unique in that "the state has a responsibility to act for the parents when the parents are unable to discharge their own responsibilities."[105] This duty to act for parents includes the responsibility to meet the religious needs of children in the child welfare system.[106] Additionally, because no state or federal statute provides that foster parents have a right to interfere with the religious beliefs of foster children, parents retain the freedom to raise their child in a certain religion.[107] Foster parents should not be allowed to make decisions concerning what religion the child should practice while in foster care.[108] The foster parents should, to the best of their abilities, adhere to whatever religious education the biological parents have bestowed upon their child prior to his placement in foster care.[109] Foster care parent involvement in the religious upbringing of foster children, however, requires both Religion Clauses of the Constitution to be examined closely, as any solution to the lack of religious consideration post-placement must adhere to the constitutional requirements of both Clauses.[110]

III. CONSTITUTIONAL RELIGION CLAUSES: PAST AND PRESENT

This Part explores both the Free Exercise Clause and the Establishment Clause of the First Amendment.[111] Both of these Clauses create limitations on the abilities of the government to create and enforce certain types of programs when they concern religious considerations and practices.[112] Subpart A will discuss the goals of both the Free Exercise Clause and the Establishment Clause,[113] while Subpart B will explain the ways in which the Supreme Court, through development of

undue interference with schools' curriculum decisions. William G. Ross, *The Contemporary Significance of* Meyer *and* Pierce *for Parental Rights Issues Involving Education*, 34 AKRON L. REV. 177, 185 (2000).

105. Wilder v. Bernstein, 848 F.2d 1338, 1348 (2d Cir. 1988).

106. *Id.*

107. *See, e.g.*, *Rodriguez*, 214 F.3d at 339-40 (discussing the fact that, until the parental rights of biological parents are terminated, foster parents necessarily have limited rights to their foster children).

108. *See* Assaf, *supra* note 1 (describing the harm that can occur when foster parents have too much of an influence on children's fundamental rights, such as religion).

109. *Cf. Pierce*, 268 U.S. at 534-35 (supporting the parents' rights to raise their children with minimal state interference); *Meyer*, 262 U.S. at 399-400 (supporting the parents' rights to raise their children with minimal state interference).

110. *See* U.S. CONST. amend. I; Donald L. Beschle, *God Bless the Child?: The Use of Religion as a Factor in Child Custody and Adoption Proceedings*, 58 FORDHAM L. REV. 383, 416 (1989).

111. *See* discussion *infra* Part III.A–C.

112. *See* U.S. CONST. amend. I.

113. *See infra* Part III.A.

various tests, has attempted to reconcile the two and protect free exercise rights, while avoiding governmental establishment of religion.[114] Additionally, Subpart C will explore the future of the most widely used constitutional tests for the Religion Clauses as well as suggested alternatives.[115] Subpart C will also discuss limitations that must be considered in any legislation concerning religious matching in foster care, so that any proposed solution conforms to the constitutional requirements of the Religion Clauses.[116]

A. Establishment Versus Free Exercise

Under the First Amendment to the Constitution, Congress is restrained from making laws that establish religion.[117] The First Amendment also provides that Congress cannot create laws that prevent the free exercise of religion.[118] The underlying premise of arguments supporting the Free Exercise Clause is that private religious values and beliefs can serve as a check on governmental power.[119] On the other hand, the Establishment Clause helps to enforce the idea that religion is a separate source of values and should be independent from government.[120] The Establishment Clause was intended to prevent government "sponsorship, financial support, and active involvement" in religious activity.[121]

The 1988 case, *Wilder v. Bernstein*,[122] is a leading case on the development of law in the area of religious matching in foster care as well as an example of the court examining the limits of the Free Exercise and Establishment Clauses.[123] *Wilder* involved a settlement agreement in which New York foster care agencies were required to place a child in the best available program if the child's parents expressed a religious preference.[124] *Wilder*, however, dealt with the interaction of religious considerations and the child welfare system before the child was placed

114. *See infra* Part III.B.

115. *See infra* Part III.C.

116. *See infra* Part III.C.

117. U.S. CONST. amend. I.

118. *Id.*

119. Alan Brownstein, *The Religion Clauses as Mutually Reinforcing Mandates: Why the Arguments for Rigorously Enforcing the Free Exercise Clause and Establishment Clause Are Stronger When Both Clauses Are Taken Seriously*, 32 CARDOZO L. REV. 1701, 1706-07 (2011).

120. *Id.* at 1707.

121. Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

122. 848 F.2d 1338 (2d Cir. 1988).

123. Michael P. Kennedy, Comment, *In the Best Interest of the Child: Religious and Racial Matching in Foster Care*, 3 GEO. MASON U. C.R. L.J. 299, 304-07 (1993).

124. *Wilder*, 848 F.2d at 1343-44.

into foster care.[125] The settlement agreement discussed in that case never addressed how religious considerations would be handled after the child was placed into foster care, or if the child happened to be placed in a home in which the foster parents did not have the same religion or religious practices as the child.[126]

Importantly, however, *Wilder* does consider a way in which the Free Exercise Clause and the Establishment Clause can be implicated in the context of providing welfare services to children.[127] In that case, appellants, who objected to a settlement agreement in part on the grounds that it created an entanglement between the government and religious agencies which violated the Establishment Clause and in part on the grounds that the Free Exercise Clause would be violated because the settlement would reduce the frequency of religiously-matched foster care placement, were denied judicial relief.[128] In that case, the court held that, although the settlement's terms stated that children would be placed in religiously-matched homes on a first-come first-serve basis; this did not violate the Free Exercise Clause just because there would inevitably be many children who would not be able to be placed, since there was a great amount of Catholic and Jewish children, and not enough homes for them.[129] This settlement term, the court noted, was an effort of the parties to take into account the limitations of the Establishment Clause.[130] With regard to the appellants' argument about the settlement violating the Establishment Clause, the court held that the standard to determine entanglement between religious agencies and the government must be relaxed in the context of child welfare because of the special role of child welfare agencies.[131] Because foster care agencies are responsible for exercising the judgment of parents who are unable to do so themselves, they must either allocate resources to manage the religious education portion of parental care, or take action themselves to make sure the religious needs of children in foster care are met.[132] Either way, the state must concern itself, in some fashion, with religion more than it would in other circumstances, such as education.[133]

125. *Id.* at 1343-45.
126. *Id.* at 1343-47.
127. *Id.* at 1346-49.
128. *Id.* at 1343, 1346-47, 1350.
129. *Id.* at 1346-47.
130. *Id.* at 1347.
131. *Id.*
132. *Id.* at 1348.
133. *See id.*

B. Religion Clause Tests: The Basics

The conflicting goals of both the Establishment Clause and the Free Exercise Clause have caused the Supreme Court to become involved in establishing limitations on the extent of the two.[134] Scholars have noted that there are "articulable tests for analysis of establishment clause and free exercise clause cases," that have not created standardized and predictable results in Religion Clause cases.[135] While there have been suggested alternatives, scholars note that the test established in *Lemon v. Kurtzman*[136]—commonly known as the *Lemon* test—is the standard to measure the Establishment Clause claims that individuals bring against the government.[137] While the *Lemon* test has been applied,[138] it has also been modified by subsequent case law, and the modified version remains in use by the federal appellate courts.[139]

In *Lemon*, the Court announced a three-prong test to determine if a state program violated the Establishment Clause of the Constitution.[140] The Supreme Court held that a statute concerning religion must have a secular legislative purpose, it must neither advance nor inhibit religion, and it must not create excessive entanglement between government and religion.[141] In determining if there is excessive entanglement between the government and religion, the Court looks at the purposes of

134. *See, e.g.*, Emp't Div. v. Smith, 494 U.S. 872, 874, 890 (1990) (upholding a state policy that an individual could not collect unemployment if he had been terminated from work due to drug use for religious reasons); Wisconsin v. Yoder, 406 U.S. 205, 207, 214 (1972) (holding a state statute unconstitutional that required compulsory attendance at school until age sixteen, where there was a conflict with age-old Amish tradition); Lemon v. Kurtzman, 403 U.S. 602, 606-07 (1971) (holding a Pennsylvania state law unconstitutional that provided reimbursement to public schools that taught secular subjects, and holding a Rhode Island statute unconstitutional that supplemented salaries of nonpublic school teachers).

135. *See* Beschle, *supra* note 110, at 394; Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 940 (1986) (suggesting a modification of the Court's three-part test for an establishment of religion to a noncoercion standard that would allow the government to "pursue its legitimate purposes even if to do so incidentally assists the various religions"); Simcha David Schonfeld, *A Failing Grade: The Court in* Zelman *and Its Missed Opportunity to Clarify the Confusing State of Establishment Clause Jurisprudence*, 20 T.M. COOLEY L. REV. 489, 505 (2003) (expressing a disappointment, in light of recent case decisions, in the Court's inadequate explanation of what the endorsement test entails).

136. 403 U.S. 602 (1971).

137. Beschle, *supra* note 110, at 391-92.

138. *See, e.g.*, Freethought Soc'y v. Chester Cnty., 334 F.3d 247, 256, 259-60 (3d Cir. 2003); Bauchman v. W. High Sch., 132 F.3d 542, 552-53 (10th Cir. 1997).

139. *See Freethought Soc'y*, 334 F.3d at 259-60 & n.9 (applying, instead, the "endorsement test" that seeks to elicit whether the practice in question sends a message to reasonable observers that they are outsiders to a religious practice and that the government action is perceived as endorsing religion); *Bauchman*, 132 F.3d at 551-53 (applying the endorsement test).

140. *Lemon*, 403 U.S. at 612-13.

141. *Id.*

institutions that benefit from government action, the type of aid provided to the institution by the government, and the type of relationship that is created between the government and the religious institution when the statute went into effect.[142] The Court has found excessive entanglement where a government program has created a situation in which the sole beneficiaries are schools dedicated to the mission of promoting the Catholic faith.[143] The *Lemon* test has remained one of the most commonly used tests in Establishment Clause cases.[144]

Following *Lemon*, the Court used an opportunity in *Wisconsin v. Yoder*[145] to make a ruling on the limits that the Free Exercise Clause places on state action.[146] In this case, Wisconsin passed a statute that required children to attend school until age sixteen.[147] The respondents, the Yoder family, had refused to send their children to school after completion of the eighth grade because their religious doctrine taught that continuing secondary education created an unacceptable exposure to worldly influences.[148] The Court articulated that in order for the State to succeed in implementing compulsory school attendance beyond the eighth grade, it would have to show that it did not deny free exercise of religion, or, in the alternative, that there was an overriding state interest that would prevent the respondents from claiming protection under the Free Exercise Clause.[149] The Court noted that, even where there may be an important social purpose for upholding a particular statute, free exercise of religion must be protected.[150] In holding that Wisconsin's compulsory attendance law violated the respondents' free exercise rights, the Court emphasized that not attending school past the eighth grade was fundamental to their faith and that the law would "affirmatively compel[] them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs."[151] The Court's decision in *Yoder*, however, was

142. *See id.* at 615.

143. *Id.* at 615-16. The Court, in *Lemon*, also found entanglement where a state program evaluated school records to determine the religious content of a religious organization; this type of close arrangement created a relationship "pregnant with dangers of excessive government direction of church schools and hence of churches." *Id.* at 620.

144. *See* Lisa M. Kahle, Comment, *Making "Lemon-Aid" from the Supreme Court's* Lemon*: Why Current Establishment Clause Jurisprudence Should Be Replaced by a Modified Coercion Test*, 42 SAN DIEGO L. REV. 349, 352 (2005).

145. 406 U.S. 205 (1972).

146. *See id.* at 214.

147. *Id.* at 207.

148. *Id.* at 210-11.

149. *Id.* at 214.

150. *See id.*

151. *Id.* at 216-19.

limited to very specific facts.[152] The Court has continued to hold that free exercise of religion can be limited under certain circumstances.[153]

In *Employment Division v. Smith*,[154] the Court held that a state law prohibiting possession of controlled substances—unless prescribed by a medical practitioner—did not infringe upon respondents' free exercise rights.[155] In defining controlled substances, the statute specifically included peyote, a hallucinogenic plant.[156] In *Employment Division*, the respondents were members of a religious denomination that used "peyote for sacramental purposes."[157] They were fired for the use of the drug, and were subsequently unable to collect unemployment benefits.[158] In holding that the state law, which labeled peyote as an impermissible controlled substance, did not infringe the respondents' free exercise rights, the Court explained that generally applicable laws which impinge religious action are unconstitutional only if the claim involves constitutional protections aside from the Free Exercise Clause.[159] In the case of *Yoder*, however, the respondents only claimed a violation of the First Amendment because there was "otherwise prohibitable conduct accompanied by religious convictions."[160] The Court held that the underlying conduct itself had to be something out of the reach of government regulation; otherwise, the respondents would not have a free exercise claim.[161] The Court also emphasized that it could not apply a "compelling state interest" test because there was no legal principle that could determine whether or not an individual's belief was central to his religion.[162] The Court cannot make a determination on the position of a belief within a religion.[163]

These tests must be relevant considerations in trying to remedy the problem of a lack of religious considerations of children in foster care after they have been placed with a foster family.[164] While children and their parents have religious freedoms, the foster parents have religious

152. *Id.* at 234-36.
153. *See, e.g.*, Emp't Div. v. Smith, 494 U.S. 872, 890 (1990).
154. 494 U.S. 872 (1990).
155. *Id.* at 874, 890.
156. *Id.* at 874.
157. *Id.*
158. *Id.*
159. *Id.* at 881.
160. *Id.* at 881-82.
161. *Id.* at 882.
162. *Id.* at 886-87.
163. *Id.* at 887.
164. *See* Kelsi Brown Corkran, Comment, *Free Exercise in Foster Care: Defining the Scope of Religious Rights for Foster Children and Their Families*, 72 U. CHI. L. REV. 325, 329-30, 338-40, 347 (2005).

freedoms as well.[165] Any solution to account for religious considerations after a child is placed in foster care must not violate the Establishment Clause and must not infringe upon the free exercise rights of the biological parent, the child, or the foster parent.[166] There are further considerations about whether a solution to this problem should be aimed at protecting the religious practices and beliefs that the biological parents have taught their child, or the religious practices and beliefs that the child has developed himself.[167] This Note adopts the perspective that not allowing the child to maintain religious practices while in foster care is a violation of the parents' rights to raise their child by the doctrines of particular religious denomination; it is from this perspective that the solution is suggested.[168]

C. Interpretation and Application of the Religion Clauses

Recently, scholars have pushed for the Supreme Court to consider reconfiguring the application of the *Lemon* test in Establishment Clause cases.[169] While the *Lemon* test is the most commonly used test for determining whether a statute violates the Establishment Clause, this standard has been relaxed over the years by the introduction of the endorsement test.[170] While the *Lemon* test focuses on a statute's entanglement with religion, the endorsement test focuses more on whether or not the statute endorses or disapproves of a particular religion

165. *See id.* at 347-50 (discussing the relevance of the religious beliefs of foster parents when considering the free exercise rights of children in foster care and their parents).

166. *See id.* at 328, 331-32 ("It is reasonable to conclude, then, that foster home activity is subject to constitutional constraints on government action, including the Free Exercise Clause.").

167. *See generally* Matt Steinberg, Note, *Free Exercise of Religion: The Conflict Between a Parent's Rights and a Minor Child's Right in Determining the Religion of the Child*, 34 U. LOUISVILLE J. FAM. L. 219 (1995). The constitutional rights of children have historically been placed "in the hands of their parents." *Id.* at 222. Courts have been reluctant, however, to equate the rights of children with the rights of adults, due to the inability of children to make informed and mature decisions. *Id.* at 222-23; *see, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 233 (1972) (discussing the obligations of parents to inculcate their children with "moral standards, religious beliefs, and elements of good citizenship"). For another discussion of the importance of children's interests in religious considerations, see Martha Albertson Fineman, *Taking Children's Interests Seriously*, *in* WHAT IS RIGHT FOR CHILDREN? THE COMPETING PARADIGMS OF RELIGION AND HUMAN RIGHTS 229, 229 (Martha Albertson Fineman & Karen Worthington eds., 2009). The discussion of whether a solution should protect the religious beliefs that the biological parents have taught their child or the religious beliefs that the child has developed on his own, however, is beyond the scope of this Note.

168. *See infra* Part V.

169. *See, e.g.*, Schonfeld, *supra* note 135, at 501; Kahle, *supra* note 144, at 386-87; *see also* Brief of Amicus Curiae of Pacific Legal Foundation, Independent Voices for Better Education, Teachers for Better Education, Ira J. Paul and Robert N. Wright in Support of Petitioners at 12-13, Zelman v. Simmons-Harris, 539 U.S. 639 (2002).

170. *See* Schonfeld, *supra* note 135, at 493; *see also, e.g.*, Agostini v. Felton, 521 U.S. 203, 220 (1997).

or religious belief.[171] A third and final test that the Court has used is the coercion test, which focuses on whether the statute in question pushes an individual to participate in religious activity.[172] However, the future of the *Lemon* test is unclear because of the alternatives that exist and the recent criticism that the entanglement prong is inappropriate for Establishment Clause analysis.[173]

The *Lemon* test has been difficult to use because Supreme Court justices have questioned whether the test is effective in providing concrete results in Establishment Clause cases, particularly since the test requires courts to determine subjective legislative intent.[174] Determining subjective legislative intent is always difficult, and focusing on subjective legislative intent gives legislators a motive to lie about their justifications for supporting bills that affect religion.[175] The Court, however, seems to disfavor this approach, preferring a more relaxed and objective standard, which could ultimately bring more certainty to First Amendment litigation.[176]

IV. DO PARENTS HAVE ANY VIABLE REMEDY AGAINST FOSTER CARE AGENCIES?

This Part considers the various remedies that current law provides parents when they either suspect that a state with a religious-matching statute does not provide reasonable efforts to place the child with a family of the child's religion, or when reasonable efforts are unsuccessfully made and the child is placed with a family that ultimately behaves in a manner that threatens to alter or actually does alter the religion or religious beliefs of the foster child.[177] Subpart A argues that biological parents in this situation would not be able to bring a claim for the violation of a private right under 42 U.S.C. § 1983.[178] This Subpart also explains that, in light of the Court's interpretation of the Free Exercise Clause, biological parents in many situations are unable to bring a successful claim for deprivation of private rights for the violation of First Amendment free exercise rights.[179] Subpart B explores the

171. Schonfeld, *supra* note 135, at 493; *see* Lemon v. Kurtzman, 465 U.S. 668, 690 (1985) (O'Connor, J., concurring).

172. Schonfeld, *supra* note 135, at 495; *see, e.g.*, Lee v. Weisman, 505 U.S. 577, 587 (1992).

173. Schonfeld, *supra* note 135, at 503.

174. Kahle, *supra* note 144, at 356. The first prong of the three-prong test is that the statute must have a secular legislative intent. *Lemon*, 403 U.S. at 612-13 (majority opinion).

175. Kahle, *supra* note 144, at 357-58.

176. *See id.* at 356, 361.

177. *See infra* Part IV.A–B.

178. 42 U.S.C. § 1983 (2006); *see infra* Part IV.A.

179. *See infra* Part IV.A.

standard of the best interests of the child, and concludes that, while religion may be an important consideration in reuniting foster children and their parents, it would often be a secondary factor to more pressing concerns, and thus, the best interests standard would not be an adequate solution for parents to challenge whether the religion of the child was being acknowledged.[180] While religion may not be the most important concern, it certainly can effect a child in a way that could help make long-term care and adoption or short-term care and eventual reunification with the parents an easier process.[181]

A. No Violation of a Private Right Under § 1983

Individuals have a private right of action for deprivation of constitutional rights under 42 U.S.C. § 1983.[182] In *Suter v. Artist M.*,[183] the Supreme Court held that the Adoption Assistance and Child Welfare Act of 1980 ("Adoption Act")[184] did not confer an enforceable federal right for parents.[185] In that case, the statute in question had provided for "[s]tates receiving funds for adoption assistance to have a 'plan' to make 'reasonable efforts' to keep children out of foster homes."[186] In order for an individual to have a private right of action under this statute, Congress must manifest an "unambiguous" intent to confer individual rights upon the individual.[187]

In *Suter*, the Court examined the provision of the Adoption Act that established a program through which the federal government would reimburse states for certain expenses pertaining to foster care and adoption services.[188] In that case, respondents argued that the state foster care agency failed to make reasonable efforts to prevent the removal of the child and to promote reunification once the child had been removed from the home.[189] The Court was presented with the issue of whether the Adoption Act unambiguously conferred upon foster children the right to

180. *See infra* Part IV.B.

181. *See* Dew et al., *supra* note 17, at 388 (suggesting that increased religious activity correlates with lower levels of adolescent substance abuse); Hill et al., *supra* note 16, at 896-97 (suggesting that increased religious activity correlates with more favorable parenting outcomes); Mahoney, *supra* note 18, at 690-91 (suggesting that religious activity may help decrease family conflict).

182. 42 U.S.C. § 1983.

183. 503 U.S. 347 (1992).

184. Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified in scattered sections of 42 U.S.C.).

185. *See Suter*, 530 U.S. at 363.

186. § 101, 94 Stat. at 503; Gonzaga Univ. v. Doe, 536 U.S. 273, 281 (2002).

187. *Gonzaga Univ.*, 536 U.S. at 281.

188. *Suter*, 530 U.S. at 350-51.

189. *Id.* at 352.

enforce these provisions against the states.[190] In holding that the Adoption Act did not create a right under 42 U.S.C. § 1983, the Court emphasized that the wording of the statute left the states with broad discretion to determine reasonable efforts to prevent the removal of the child from the home or to reunite the child with his parents.[191] The Adoption Act contained enforcement mechanisms, such as the authority to reduce or eliminate payment to a state that did not follow its own plan or the requirements of the Adoption Act, but the statute did not have any language that showed that Congress unambiguously created a private right of action for individuals.[192]

Subsequently, however, Congress enacted the Improving America's Schools Act of 1994,[193] which provided that any provision in Chapter 531 of Title 42 of the U.S. Code was not "deemed unenforceable because of its inclusion in a section of this chapter requiring a State Plan or specifying the required contents of a State plan."[194] The statute also specifically stated that it would not alter the decision of the Court in *Suter*.[195] Thus, there is no private right of action for foster care children and their families if the foster care agency does not make reasonable efforts to preserve and reunify families.[196]

More recently, parents brought suit against a state child protection agency alleging that it violated conditions for receipt of foster care funding because, after removing their children, the agency "placed them in different foster homes from each other, and failed to place them with foster families 'who respected and followed [the foster children's] religious, ethnic or cultural background.'"[197] They also alleged that the child protection agency in New Hampshire did not make diligent efforts to recruit potential foster or adoptive families to reflect the ethnic and

190. *Id.* at 357.

191. *See id.* at 360 (stating that the meaning of "reasonable efforts" varies with the circumstances and thus the state has broad discretion).

192. *Id.* at 360, 363.

193. Pub. L. No. 103-382, 108 Stat. 3518 (codified as amended in scattered sections of 20 & 42 U.S.C.).

194. 42 U.S.C. § 1320a-2 (2012).

195. *Id.* Section 1320a-2 states:

> This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in Suter v. Artist M., 112 S. Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in Suter v. Artist M. that section 671(a)(15) of this title is not enforceable in a private right of action.

Id.; *see* Jeanine B. *ex rel.* Blondis v. Thompson, 877 F. Supp. 1268, 1282-84 (E.D. Wis. 1995).

196. *See* 42 U.S.C. § 1320a-2 (explaining that the statute neither limits nor expands private rights to enforce state foster care plans).

197. BK v. N.H. Dep't of Health & Human Servs., 814 F. Supp. 2d 59, 61 (D. N.H. 2011).

racial diversity of the children.[198] In *BK v. New Hampshire Department of Health and Human Services*,[199] three minor children, all siblings, were removed from their home and placed in foster care with different families.[200] Their parents, born in India, raised them in the Hindu faith and taught them that the cow was sacred; they were not allowed to eat beef or eat off dishes on which beef was cooked, or live in households in which beef was consumed.[201] The parents alleged that they offered to supply food for their children when they became aware that the children were placed in a home that did not recognize Hindu religious practices; however, the foster parents rejected this offer.[202] The parents also alleged that two of the children were taken to a Christian church on a weekly basis.[203]

In holding that the plaintiffs did not state a claim for which relief could be granted, the court emphasized that any attempt of Congress to impose requirements on the states by way of the Spending Clause must be unambiguous.[204] The court held that there was no clear standard to enforce the requirement that reasonable efforts should be made to place siblings in the same foster home or promote the reunification of the children and their parents, and thus, followed the majority interpretation of 42 U.S.C. § 1320a-2.[205] The court also examined the plaintiffs' allegations that the agency did not diligently recruit foster or adoptive families to reflect the ethnic and racial diversity of the state.[206] The court held that, pursuant to 42 U.S.C. § 1320a-2, the plaintiffs did not have a private right of action because the term "diligent recruitment" did not provide enough guidance or notice to the states about what was required of them.[207] Thus, because the courts have been consistent in holding that language such as "reasonable efforts" and "diligent recruitment" are insufficient to provide a private right of action under 42 U.S.C. § 1983 for individuals who allege that they have been harmed by a state's failure to meet certain requirements under federal statutes, it is unlikely

198. *Id.*
199. *Id.*
200. *Id.* at 62.
201. *Id.*
202. *Id.*
203. *Id.* at 63.
204. *Id.* at 66, 69, 71.
205. 42 U.S.C. § 1320a-2 (2006); *BK*, 814 F. Supp. 2d at 66, 68-69. The majority interpretation of 42 U.S.C. § 1320a-2 is that the statute does not require the courts to revisit case law that existed before *Suter*. *BK*, 814 F. Supp. 2d at 69. Courts are allowed to "follow *Suter* except insofar as it applied 'grounds for determining the availability of private actions to enforce State plan requirements.'" *Id.* (quoting 42 U.S.C. § 1320a-2).
206. *BK*, 814 F. Supp. 2d at 71.
207. *Id.*

that parents seeking to recover under these provisions of the Adoption Act or ASFA will ever be provided with a private right of action when they allege that the foster agency did not make reasonable efforts for reunification of the child and the parent.[208]

Additionally, parents will most likely be unable to recover under 42 U.S.C. § 1983 for a violation of their First Amendment rights if they allege that their right to free exercise of religion has been violated.[209] Since 1925, the Supreme Court has held that states should respect parental liberty regarding the education and upbringing of children.[210] The free exercise rights of parents are of constitutional significance, and parents are exercising this right when they make choices and select religious experiences for their children.[211] However, a significant factor in determining the extent of the rights of the individual is his legal status—for example, a child in custody of his natural parents or a child legally in state custody.[212]

For instance, the Supreme Court has held that prisoners are still afforded protection under the First Amendment;[213] however, the Court has also held that incarceration may limit the exercise of constitutional rights due to valid security objectives of prison administrators.[214] This comparison does not suggest that foster children deserve the same treatment or are in similar circumstances as prisoners, but it does suggest that children in foster care or parents who voluntarily place their children in foster care may warrant different treatment.[215] Generally, courts have noted that there can be limitations on parenting choices when parents use religious grounds to refuse necessary medical treatment for their child.[216] Courts have also held that, the rights of parents are "not absolute where . . . a parent voluntarily gives, or involuntarily loses, custody of a child to the state, which subsequently places the child in foster care."[217]

At least two district courts have held that parents do not have a free exercise claim when they allege that foster parents acted against their

208. *See* 42 U.S.C. § 1320a-2; Suter v. Artist M., 503 U.S. 347, 364 (1992).

209. *See infra* notes 210-25 and accompanying text.

210. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925).

211. *See* Wisconsin v. Yoder, 406 U.S. 205, 233-34 (1972).

212. Kennedy, *supra* note 123, at 315.

213. Cruz v. Beto, 405 U.S. 319, 322 (1972) (per curiam). For a discussion of the constitutional rights of incarcerated persons, see generally U.S. COMM'N ON CIVIL RIGHTS, ENFORCING RELIGIOUS FREEDOM IN PRISON (2008).

214. O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987).

215. *See* Kennedy, *supra* note 123, at 315.

216. *See, e.g.*, Jehovah's Witnesses v. King Cnty. Hosp., 278 F. Supp. 488, 504 (W.D. Wash. 1967).

217. Pfoltzer v. Fairfax, 775 F. Supp. 874, 885 (E.D. Va. 1991).

wishes in raising their child with certain religious values.[218] In *Walker v. Johnson*,[219] the plaintiff claimed a violation of the First Amendment because her children attended Protestant Sunday school classes after she previously stated that she did not want them to.[220] In *Pfoltzer v. County of Fairfax*,[221] the plaintiffs' claim was based on allegations that while in foster care, their children were not permitted to practice their faith pursuant to the preference the plaintiffs had suggested.[222] In both cases, the courts held that the rights of the parents to have control over the religious upbringing of their children were not absolute once the child was in foster care.[223] Courts have held that states are, at most, required to make reasonable efforts to place children in homes with foster parents practicing the same religion; however, absent some state regulation, the state has no duty to do so.[224] Once the state makes a reasonable effort to place the child with a religious match, the parents most likely will not have a viable First Amendment claim, and the state is not required, by statute or regulation, to do anything else except look at the overall best interests of the child.[225]

B. The Best Interests of the Child Standard Is Insufficient

In order to determine what foster home a child is placed in when the state takes custody, the federal government has adopted the broad best interest of the child standard.[226] States have also enacted legislation that requires the best interest of the child to be the standard used when making child welfare decisions in the context of foster care placement or child custody.[227] This standard focuses on the idea that the child's interest is of paramount concern when both the custody of the child and

218. *See, e.g.*, Walker v. Johnson, 891 F. Supp. 1040, 1048-49 (M.D. Pa. 1995); *Pfoltzer*, 775 F. Supp. at 885.

219. 891 F. Supp. 1040 (M.D. Pa. 1995).

220. *Id.* at 1047.

221. 775 F. Supp. 874 (E.D. Va. 1991).

222. *Id.* at 877, 885.

223. *Walker*, 891 F. Supp. at 1048; *Pfoltzer*, 775 F. Supp. at 885.

224. *See Walker*, 891 F. Supp. at 1048-49; *Pfoltzer*, 775 F. Supp. at 885.

225. *See Walker*, 891 F. Supp. at 1049; *Pfoltzer*, 775 F. Supp. at 885.

226. 42 U.S.C. § 5106a(b)(2)(A)(xiii)(II) (2006 & Supp. V 2012) (providing that state governors must submit assurance that their state plan has provisions requiring the state to make court recommendations in the best interests of the child in cases involving victims of child abuse and neglect); 42 U.S.C. § 671(a)(26)(A)(ii) (2006) (requiring state plans to compel the completion of home studies within seventy-five days if state documents certify that a home study would be in the best interests of the child).

227. *E.g.*, 750 ILL. COMP. STAT. ANN. 5/609(a) (West 2007 & Supp. 2013); MINN. STAT. ANN. § 260C.601(2)(1) (West Supp. 2012); MONT. CODE ANN. § 42-4-201(2) (2011); N.J. STAT. ANN. § 9:3-40 (West 2002 & Supp. 2013); N.Y. DOM. REL. LAW § 240(1)(a)(4) (McKinney 2010 & Supp. 2013).

the child's placement is in controversy.[228] Because it is discretionary, a caseworker may not factor in religion as a consideration when there are other factors that are more important.[229]

When a determination of the best interest of the child needs to be made, states require agencies to make the decision based on a number of factors.[230] In some states, these enumerated factors may include: the physical and mental well-being of a child; the child's background and family ties; the child's sense of attachment; the constitutional rights of all parties involved; and the importance of the birth family relationship.[231] In other states, the statutory requirement of using the standard of the best interest of the child only guides caseworkers by informing them that the paramount concern in all decisions is the child's health and safety.[232] Where caseworkers are statutorily bound to make placement determinations, especially in states with statutes which indicate that the child's health and safety are of paramount concern and there is a situation involving abuse or neglect, religious considerations may very well be put on the backburner, although religion might be something important to that child and his family.[233] Therefore, because religion is only a discretionary factor,[234] there is a high risk that it will be overshadowed.[235]

V. POSSIBLE SOLUTIONS

Although religious matching is statutorily provided for in many states,[236] the statutes are ineffective where states do not have a regulatory system in place to help ensure that the religious rights of foster care children and their parents are protected.[237] In June 2012,

228. JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 105 (1979).

229. *See* N.J. STAT. ANN. § 30:4C-11.1(a) (West 2008) (explaining that "the child's health and safety shall be of paramount concern"); N.Y. SOC. SERV. LAW § 358-a(3)(c) (McKinney 2003 & Supp. 2013).

230. *See, e.g.*, 705 ILL. COMP. STAT. ANN. 405/1-3(4.05) (West 2007 & Supp. 2013); MO. REV. STAT. § 211.443 (2013).

231. *See, e.g.*, 705 ILL. COMP. STAT. ANN. 405/1-3(4.05); MO. REV. STAT. § 211.443.

232. *See, e.g.*, N.J. STAT. ANN. § 30:4C-11.1(a); N.Y. SOC. SERV. LAW § 358-a(3)(c).

233. *See, e.g.*, Div. of Youth & Family Servs. v. M.M.K., No. FG-16-104-08, 2010 WL 1526321, at *15 (N.J. Super. Ct. App. Div. Apr. 19, 2010).

234. *See* 705 ILL. COMP. STAT. ANN. 405/1-3(4.05); MO. REV. STAT. § 211.443.

235. *See* Walker v. Johnson, 891 F. Supp. 1040, 1049 (M.D. Pa. 1995) (holding that transfer of the children to a different foster home in order to abide with the parents' wish that the children be cared for by persons of the same religion would disrupt the children's lives due to the length of time that they had already stayed with the family).

236. *E.g.*, N.H. REV. STAT. ANN. § 169-B:33 (2002); N.Y. SOC. SERV. LAW § 373. New York also has a state constitutional provision that requires reasonable efforts to be made to place foster children in homes with foster caretakers of the same religion. *See* N.Y. CONST. art. VI, § 32.

237. *See* Corkran, *supra* note 164, at 329-30.

Congressman John Conyers introduced the Rehab and Ahmed Amer Foster Care Improvement Act of 2012 ("Foster Care Improvement Act").[238] The Foster Care Improvement Act was introduced after parents "lost two of their children to Michigan's foster care system," following the accidental death of their son in 1985.[239] Although the mother was acquitted of any criminal wrongdoing in 1986, the state refused to return those two children to the parents, and also removed a third child from their home.[240] After the parents were acquitted of the criminal charges against them, they found out that their three other children, who they had raised in the Muslim faith, had been converted and ultimately raised as Christians.[241] Although the children's uncle, who had previously served as their foster parent, petitioned for temporary custody of the children, the court denied the petition and the children lived with an evangelical Christian family that renamed the children with Christian names and raised them as Christians.[242] These events inspired Representative John Conyers, Jr. from Michigan to introduce the Foster Care Improvement Act,[243] which promotes kinship foster care.[244]

Kinship foster care allows for "kinship guardianship assistance agreements" to provide payments to relatives who have assumed guardianship of children they have cared for as foster parents.[245] States are not currently mandated to participate in kinship foster care.[246] If passed, a statute such as the Foster Care Improvement Act would provide that state agencies must consider placing the child in kinship foster care before attempts are made to place the child with a foster

238. Rehab and Ahmed Amer Foster Care Improvement Act of 2012, H.R. 6021, 112th Cong. This bill was reintroduced in Congress in 2013. Rehab and Ahmed Amer Foster Care Improvement Act of 2013, H.R. 102, 113th Cong.

239. Matthew Morgan, *H.R. 6021, the "Rehab and Ahmed Amer Foster Care Improvement Act of 2012,"* MUSLIM FOSTER & FAM. SERVICES (June 26, 2012, 8:05 PM), http://www.muslimfosterandfamilyservices.blogspot.com/2012/06/hr-6021-rehab-and-ahmed-amer-foster.html.

240. *Id.*

241. Gregg Krupa & Shanteé Woodards, *Judge Orders Muslim Kids to Be Christians*, ISLAMNEWSROOM.COM, http://www.islamnewsroom.com/news-we-need/360-muslimchildren2 (last visited Feb. 16, 2014).

242. Morgan, *supra* note 239.

243. H.R. 6021.

244. *Id.* Some scholars argue that kinship foster care is the answer to creating more instances of reunification between the parents and the child after a child is placed in the foster care system. *See generally* David J. Herring et al., *Evolutionary Theory and Kinship Foster Care: An Initial Test of Two Hypotheses*, 38 CAP. U. L. REV. 291 (2009); Megan M. O'Laughlin, Note, *A Theory of Relativity: Kinship Foster Care May Be the Key to Stopping the Pendulum of Terminations vs. Reunification*, 51 VAND. L. REV. 1427 (1998) (discussing the benefits of kinship foster care).

245. 42 U.S.C. § 671(a)(28) (2006 & Supp. V 2012).

246. *Id.* (stating that it is the option of the state to enter into kinship guardianship agreements with relatives of foster children).

family that is unrelated to the child.[247] The Foster Care Improvement Act has not yet been enacted;[248] however, if enacted, this statute could foreseeably begin to help correct the problem of post-placement religious considerations by having foster care agencies seek out adult relatives of the child who would be more likely to maintain the child's religious upbringing.[249] Subpart A suggests a federal spending program, broader than that of the Foster Care Improvement Act, which would help regulate religious activity of foster care children after placement, especially when the foster care agency may not be able to find adult relatives or a foster care family of the same religion.[250] Subpart A argues that a federal spending program is desirable to create uniformity among the states in how they manage this problem.[251] As an alternative, Subpart B suggests a state program that may work better in light of possible objections that could be raised against a federal spending program.[252]

A. A Federal Regulatory Solution

A federal spending program is a possible way to require states to take the religious beliefs of children taken into foster care into consideration.[253] In light of the Spending Clause of the Constitution, the House of Representatives has considered that it, along with the Senate, has the authority to pass federal legislation regarding state procedures in placing children removed from the custody of their parents.[254] While the Foster Care Improvement Act involves using kinship foster care as a vehicle to help protect the religious activity of children in foster care, this Note proposes a federal spending program, similar to that

247. *See* H.R. 6021. Legislators have also made previous attempts to establish programs that would establish a Kinship Navigator Program that would promote helping kinship caregivers to "navigate existing programs and services to help them learn about and obtain assistance to meet the needs of the children they are raising, and their own needs." *Summary of the Kinship Caregiver Support Act (S. 985)*, CHILD WELFARE LEAGUE OF AM., http://www.cwla.org/advocacy/summarykinshipact.htm (last visited Feb. 16, 2014). A Kinship Navigator Program would provide money to states and agencies with experience working with kinship caregivers so that they may improve and better address the needs of kinship caregivers. *Id.*

248. *See* Rehab and Ahmed Amer Foster Care Improvement Act of 2013, H.R. 102, 113th Cong.

249. *See id.*

250. *See infra* Part V.A.

251. *See infra* Part V.A.

252. *See infra* Part V.B.

253. *See* South Dakota v. Dole, 483 U.S. 203, 207 (1987) (stating that the federal government is allowed to condition state receipt of federal funding on provisions relating to general welfare); 158 CONG. REC. H4064 (daily ed. June 26, 2012); *infra* Part V.A.1.

254. *See* 158 CONG. REC. H4064 (statement of Rep. John Conyers, Jr.).

envisioned in the Foster Care Improvement Act, which would protect the religious practices of a broader group of foster care children, namely those without kin.[255] Under such a program, the federal government would only decrease state foster care funds if the state did not develop a mechanism to protect the religious activity of children in foster care when the biological parents raise the issue.[256]

1. Authority Under the Spending Clause

In order to implement a spending program, Congress must adhere to three general constitutional limitations.[257] In *South Dakota v. Dole*,[258] the Supreme Court held that when Congress engages in a spending program under Article I, Section 8, Clause I of the U.S. Constitution, the spending must be for the general welfare; the states must be able to knowingly decide whether to participate in the program; and the conditions of the program must relate to a federal interest in the national program or project.[259] In *Dole*, the Court analyzed whether Congress had constitutional authority to create a federal spending program that would decrease a state's highway funding by five percent if the state did not increase its legal drinking age to twenty-one.[260] The first limitation, that the spending must be for the general welfare, was satisfied because there was a national problem with individuals driving while intoxicated.[261] The second restriction, that the states must be able to knowingly decide whether to participate in the program, was satisfied when the Court stated that Congress clearly listed the conditions upon which the states would receive their federal funds.[262] Finally, the Court found the third limitation, that the conditions of the spending program must have a relation to a federal interest in a national program or project, was satisfied when the Court declared that "the condition imposed by Congress [was] directly related to one of the main purposes for which highway funds [were] expended—safe interstate travel."[263] The Court held that federal funds could not be conditioned on an activity that was unconstitutional, and that a five percent decrease in highway funding

255. *See* discussion *supra* Part V.A; *see also* Rehab and Ahmed Amer Foster Care Improvement Act of 2012, H.R. 6021, 112th Cong.

256. *See Dole*, 483 U.S. at 207 (describing the federal government's ability to condition state receipt of federal funding).

257. *See id.*

258. 483 U.S. 203 (1987).

259. *Id.* at 207.

260. *Id.* at 205.

261. *Id.* at 208.

262. *Id.*

263. *Id.* at 208-09.

was only "relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose."[264]

The Court has continued to hold that Congress may only use its enumerated powers of taxing and spending to encourage the states to adopt policies and legislation that it could not directly impose.[265] In *National Federation of Independent Business v. Sebelius*,[266] the Court considered whether a Medicaid expansion that required the states to expand Medicaid coverage to cover a greater number of people exceeded Congress's enumerated power to spend.[267] In that case, if the states chose not to accept the new Medicaid provisions, then the states would not be eligible to receive any Medicaid funds at all.[268] In holding that this was not a legitimate exercise of congressional spending power, the Court emphasized that the new provisions threatened to terminate existing "significant independent grants."[269] Thus, in order to appropriately exercise congressional spending power, Congress would have to base the condition on a sum that is a smaller percentage of funding for foster care, rather than all foster care funding.[270] To determine a suitable amount of money to implement a spending program for post-foster care placement religious considerations, Congress could compare the percentage of the federal funds lost due to noncompliance with the conditions imposed by the actual amount of the state budget that consisted of federal funds.[271]

2. The Federal Government Is More Likely to Place Responsibility on the States

In developing the Constitution, the Framers designed a government of dual sovereignty that gave the federal government control over only national issues, while the states had considerable control over the "lives, liberties and properties of the people."[272] Throughout time, the role of

264. *Id.* at 210-11.

265. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2579 (2012).

266. 132 S. Ct. 2566 (2012).

267. *Id.* at 2601.

268. *Id.* at 2604.

269. *Id.* at 2603-04.

270. *See id.* (stating that conditions on the receipt of federal funding are allowed so long as they do not threaten "significant independent grants"); South Dakota v. Dole, 483 U.S. 203, 207 (1987) (stating that Congress must unambiguously condition the receipt of federal funds).

271. *Cf. Dole*, 483 U.S. at 211. The Supreme Court has held that "[e]very tax is in some measure regulatory." Steward Machine Co. v. Davis, 301 U.S. 548, 589 (1937). However, the actual determination is whether choice has become impossible. *Id.* at 590. Where a state makes a choice of "her [own] unfettered will," the Court will not find compulsion. *Id.*

272. THE FEDERALIST NO. 45 (James Madison). The Framers envisioned federal powers to encompass control over national issues such as war, peace, negotiation, and foreign commerce,

the federal government has changed, increasing its involvement in various issues which were traditionally the province of the states, such as family law.[273] Scholars have recognized that the federal government has not passed many laws that provide the federal courts with jurisdiction over family law issues, most specifically in the areas of marriage, divorce, and child custody.[274] Federalism, however, is an important part of child welfare, foster care, and adoption, as the federal government has funded state programs in these specific areas.[275] In spite of this, however, there is the general notion that issues revolving around family law should be left for states to handle.[276] The federal government has no express constitutional authority granting it power to legislate family law matters; therefore, Congress must either use its express authority to collect taxes or to expend revenues in order to influence family law in the states.[277] Although Congress can use its express constitutional authority to influence policy concerning family law in the states, there has been a reluctance for it to do so.[278] While Congress uses its power under the Spending Clause to influence family law, it is important that Congress focuses more on support enforcement and other family law areas to try to decrease the costs of the federal welfare program.[279] Because there is already a congressional concern about the exponential costs of funding state child welfare programs, it is more likely that Congress will decline the responsibility of creating another spending program concerning the foster care system.[280]

Furthermore, Congress must ensure that it does not impermissibly influence state policy in violation of the Tenth Amendment.[281] The Supreme Court has held that Congress can only legitimately exercise its spending power when it is not commandeering the states' legislatures for federal purposes.[282] Accordingly, federal law has been held

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while state control concerned the ordinary course of affairs of the people and internal order and prosperity within the state. *Id.*

273. *See* Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL'Y 267, 331-32 (2009).

274. *Id.* at 332.

275. *See id.* at 286-91.

276. *See* Elizabeth G. Patterson, *Unintended Consequences: Why Congress Should Tread Lightly When Entering the Field of Family Law*, 25 GA. ST. U. L. REV. 397, 400 (2008).

277. *See* Ankenbrandt *ex rel.* L.R. v. Richards, 504 U.S. 689, 695-97 (1992).

278. *See* Patterson, *supra* note 276, at 408.

279. *See id.* at 408-09.

280. *See id.* (discussing Congress's efforts to decrease federal spending in the area of family law).

281. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

282. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2602 (2012); Printz v. United

unconstitutional where state actors are compelled to perform federally mandated actions, such as performing mandatory background checks on handgun purchasers.[283] Regarding child welfare programs, an objection to a federally funded program for religious or nonreligious considerations can be made if the statute mandated caseworkers to consider the religious and nonreligious activities of every child in foster care.[284] The suggested program, however, would not mandate caseworkers to perform any actions.[285] States would have the option of choosing to participate in the spending program and executing a regulatory program under the spending guidelines.[286] A state's choice to not participate would be the state's choice to not accept the federal funds, and therefore would not violate constitutional principles.[287]

B. A State Regulatory Program—The More Plausible Solution

As seen by the presence of existing and proposed laws, it is clear that states have taken, and will most likely be the entities to take, any further responsibility for implementing regulatory programs to facilitate religious matching by foster care administrators.[288] Recent scholarship has noted that existing studies concerning religious activity in connection with foster care do not address religious considerations with foster children after they are in foster care placement.[289] This Note suggests and prefers a state regulatory program that would require child welfare agencies to attach an optional questionnaire about religious practices of the child.[290] The parents would even have the option of stating that they have no religious practices that they would like to be observed, in which case the religious conditions in the foster care household would still be monitored. Caseworkers would be responsible for informing parents about the option to fill out the form. If the parents decide that religious or nonreligious practices are not an important factor

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States, 521 U.S. 898, 933 (1997).

283. *See Printz*, 521 U.S. at 933.

284. *See Sebelius*, 132 S. Ct. at 2602-03; *Printz*, 521 U.S. at 933.

285. *See* South Dakota v. Dole, 483 U.S. 203, 207 (1987) (holding that a state must be able to knowingly decide whether it so chooses to participate in a federal spending program).

286. *See id.*

287. *See Sebelius*, 132 S. Ct. at 2602; *Printz*, 521 U.S. at 933, 935.

288. *See* N.H. REV. STAT. ANN. § 169-B:33 (2002) (allowing for the consideration of religion in foster care placement); N.Y. SOC. SERV. LAW § 373 (McKinney 2010) (suggesting that, when a child is under the custody of an agency, he should be placed under persons of the same religious faith where such placement is practicable); Assemb. 4353, 214th Leg. (N.J. 2011) (proposing that a child's religion is not to be changed when the child enters foster care or when the child is adopted).

289. Corkran, *supra* note 164, at 329-30.

290. *See infra* Part V.B.1–2.

for the child, they can choose not to fill out the form. However, if the parents do decide to fill out the form, then it will become a part of the child's case file. The caseworker would then be on notice that the religious or nonreligious activities of the child while in placement will be a part of the caseworker's evaluation. The proposed solution would also require the foster parents to sign an agreement containing the information about the religious or nonreligious practices, and stating that they understand and will take reasonable efforts to allow the child to be able to take part in these practices. That way, the expectations of both the biological parents and the foster parents will be set from the moment the child is in placement.[291] If the foster parents will not allow the child to participate in the religious activity that the biological parents had listed, and the birth parents do not agree with the foster parents' unwillingness to acknowledge the activity, then the caseworker will be responsible for seeking a new foster placement for the child.

1. Limitations

In order to address religious considerations in foster care, states are limited in the type of language that they must use in formulating any procedure to handle religious conflict in post-foster care placement situations.[292] One scholar has proposed three basic tenets that should be taken into consideration concerning state action regarding religious considerations in foster care placement.[293] First, in light of existing case law, the state should be allowed to resolve the issue of whether a state agency has accommodated the religious preferences of a foster care child through the use of the reasonable efforts test.[294] Second, if the child has the capacity to articulate his own religious identity, then he should be allowed to do so before the court.[295] Last, if the child articulates a religious preference that conflicts with that of the parent, and the court determines the child has the capacity to understand and reasonably make that decision, then the preference should be taken seriously.[296] These three basic considerations are reasonable in light of the importance that scholars have placed on the child's ability to develop and

291. For an example of a court-generated parental acknowledgement of rights and responsibilities, see *Acknowledgement of Possible Consequences to Parental Rights in Abuse and Neglect Cases*, STATE OF N.H. JUDICIAL BRANCH, http://www.courts.state.nh.us/forms/nhjb-2209-df.pdf (last updated July 1, 2013).

292. Corkran, *supra* note 164, at 329 (recognizing that, because of the Supreme Court's rulings, the Establishment Clause requires states to be neutral between different religions).

293. *See id.* at 345-46.

294. *Id.* at 345.

295. *Id.*

296. *Id.* at 345-46.

maintain meaningful relationships with both his biological parents and his foster parents.[297]

2. Possible Problems

Permanency hearings, as introduced in this Note, are a way for foster care agencies to work with the foster family, biological parents or guardians, and the judicial system to achieve timely and—more importantly—permanent placement for foster care children.[298] The importance of permanency planning is demonstrated by the federal government's condition of receipt of federal funding for foster care programs on the development of case plans for these children.[299] It must be noted, however, that the caseworker's reasonable efforts to promote reunification of the parents and the child are not required to be evaluated until eighteen months after the child has been in placement.[300] Because of this eighteen month time frame, the agency should set its own interim checkpoints, which may help it discover if or when problems exist with the child's placement.[301] Also, because restructuring foster care placement criteria to include recognition of religious or nonreligious preferences of foster care children or their biological parents involves an obvious consideration of religion, there are objections to the implementation of a regulatory program that would involve more paperwork and more attention from both judges and caseworkers.[302] Furthermore, there is a concern about whose religious preferences the child welfare agency must acknowledge when the biological parents and

297. *See* Daniel J. Pilowsky & Wendy G. Kates, *Foster Children in Acute Crisis: Assessing Critical Aspects of Attachment*, 35 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1095, 1096 (1996).

298. *See* Herring, *supra* note 70, at 185-87. See *supra* Part II.B for a discussion of the types of procedures that states have in place regarding procedural requirements of permanency planning.

299. *See* 42 U.S.C. § 671(a)(16) (2006). A case plan is defined as a written document that includes, among other things, a plan for services for the parents, child and foster parents, health and education records of the child, and a discussion of the appropriateness of the home or institution in which the child is placed. *Id.* § 675(1)(A)–(C) (2006 & Supp. V 2012).

300. *Id.* § 675(5)(C).

301. *See id.* § 675(5)(B) (requiring each state to have a case review system by which the status of each child in foster care is reviewed "no less frequently than once every six months"). Among other things, this allows for courts to determine the extent of the state agency's compliance with each child's case plan. *Id.*

302. See *supra* text accompanying notes 288-97 for a discussion of the plan proposed by this Note, requiring parents to complete a questionnaire concerning religious practices they consider important, and requiring the involvement of caseworkers in keeping abreast of whether these conditions are being adhered to within the foster home. *See also* Emp't Div. v. Smith, 494 U.S. 872, 886-87 (1990) ("It is no more appropriate for judges to determine the centrality of religious beliefs before applying a compelling interest test in the free exercise field, than it would be for them to determine the importance of ideas before applying the compelling interest test in the free speech field.").

children express different desires,[303] as well as a concern for the protection of the religious rights of foster parents with different religious practices if the state, in its reasonable efforts to find a religious match, cannot do so.[304]

VI. CONCLUSION

In light of the recent hostility towards Sharia law, which threatens Muslim children in the foster care system, all foster children need to be afforded greater protection of their freedom to participate in religious activities while in foster care placement.[305] The recent and growing hostility towards Sharia law and international law is just one example of a threat to the ability of parents with deeply rooted religious beliefs, and intentions to raise their children with those beliefs, to be reunited with their children after the state becomes involved in the parent-child relationship through the child welfare system.[306] State legislatures have implemented religious matching statutes, which require child welfare agencies to provide reasonable efforts to match a child with a family of the same religion when possible.[307] These statutes, however, have been unsuccessful at protecting the religious beliefs that parents have instilled upon their children before they enter foster care.[308] Crafting a solution to protect the religious practices of foster children is a difficult task, however, in light of many constitutional limitations that must be recognized.[309]

The Foster Care Improvement Act is a step in the right direction to affording greater protection to the religious practices that foster children have learned from their parents.[310] While this act could foreseeably help children who have other family members available to care for them

303. Corkran, *supra* note 164, at 344-46.

304. *See id.* at 352.

305. *See supra* Part I.

306. *See supra* Part I.

307. *See* Wilder v. Bernstein, 848 F.2d 1338, 1341-42 (2d Cir. 1988) (discussing New York's religious matching statute). Some states also have constitutional provisions that require religious matching when a court has jurisdiction over a child. *See, e.g.*, N.Y. CONST. art. VI, § 32. The New York State Constitution states:

> When any court having jurisdiction over a child shall commit it or remand it to an institution or agency or place it in the custody of any person by parole, placing out, adoption or guardianship, the child shall be committed or remanded or placed, when practicable, in an institution or agency governed by persons, or in the custody of a person, of the same religious persuasion as the child.

Id.

308. *See* Assaf, *supra* note 1.

309. *See* discussion *supra* Part III.C.

310. *See* discussion *supra* notes 236-52 and accompanying text.

when they are placed in a child welfare system, it will not be beneficial to those without extended family available to take custody of them when the need arises.[311] Ultimately, a state regulatory program involving more communication between caseworkers, foster parents, and biological parents, as well as an observation of constitutional limitations on the states' involvement in religious matters, would be the most appropriate solution for addressing the needs of foster care children after they have been afforded placement.[312]

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311. *See* Rehab and Ahmed Amer Foster Care Improvement Act of 2012, H.R. 6021, 112th Cong.; discussion *supra* notes 236-52 and accompanying text.

312. *See supra* Part V.B.

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