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Contracts and the Constitution in Conflict: Why Judicial Deference to Religious Upbringing Clauses Infringes on the First Amendment

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Abstract

When a Hasidic person files for divorce under New York law, either party to the marriage may invoke a declaratory judgment action to establish certain rights in a settlement agreement. If children are involved, such an agreement may include a religious upbringing clause, dictating that the child is to be raised in accordance with their then-existing religion—Hasidism. Deviation from the contract risks removal from the aberrant parent who intentionally or unwittingly allows the child to wane into secularism. Although the child's best interest is the cornerstone of custodial analysis, a problem emerges when his or her best interest is couched inside a religious framework, frequently leaving the court upholding continued Hasidic practice above all else. Because the First Amendment requires government neutrality in religious disputes, a contract mandating religious enforcement leaves the court in a bind, stuck between a constitutional rock and a religious hard place. This Note explores the potential constitutional and contractual conflicts implicated by enforcing religious upbringing clauses in child custody disputes, specifically in lower New York courts, as a result of deferring to religious upbringing clauses.

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I. INTRODUCTION

Picture this: you are a vulnerable teenage girl, betrothed to a stranger you have met only once.[1] You have no real agency in the agreement, so its consummation is nothing short of rape.[2] Your vows develop less into an infinity of marital bliss, than into a grim, icy domicile.[3] The space between you is furnished not with roses, rhymes, and anecdotal tales recounting the ways he loves thee, but with flying fists, lonely nights, and unilateral governance.[4] You do not get to decide to leave, *he* decides if he wants to set you free.[5] Worse yet, your confinement is reinforced by a second prison outside the home: your own community.[6]

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1. *See* Sara Stewart, *I Was a Hasidic Jew – But I Broke Free*, N.Y. POST (Feb. 7, 2012), https://nypost.com/2012/02/07/i-was-a-hasidic-jew-but-i-broke-free/; Tzack Yoked, *'It Felt Like Rape' // A Hasidic Woman's Journey Out of an Arranged Marriage – and the Closet*, HAARETZ (Jan. 18, 2018), https://www.haaretz.com/us-news/.premium.MAGAZINE-it-felt-like-rape-hasidic-woman-s-journey-out-of-arranged-marriage-and-the-closet-1.5746428?=&v=09EB3A317C2763B01654D9BA53431568&ts=_1546664124100.

2. *See* Yoked, *supra* note 1.

3. *See id.*

4. *See id.*; Etty Ausch, *How I Left My Hasidic Jewish Community & Found My Sexuality*, REFINERY29 (Jan. 9, 2018, 8:30 AM), https://www.refinery29.com/en-us/orthodox-judiasm-sexuality-leaving-hasidic-community/ (discussing her "loveless, lonely marriage"); Josefin Dolsten, *Netflix's Unkindest Cut in "One of Us,"* N.Y. JEWISH WK. (Mar. 7, 2018), https://jewishweek.timesofisrael.com/netflixs-unkindest-cut-in-one-of-us/.

5. *See* Masri v. Masri, 50 N.Y.S.3d 801, 802 (Sup. Ct. 2017). Under Jewish law, after the divorce is finalized, the woman is required to receive a "get" from her ex-husband in order to remarry. *Id.* Without it, she remains an "'agunah' (a 'tied' woman)." Aflalo v. Aflalo, 685 A.2d 523, 527 (N.J. 1996). Whether the woman receives the "get" is typically within the sole discretion of the man, as he can defend his actions as a religious ritual protected by the Free Exercise Clause of the First Amendment. *See id.* In *Afalo*, the Superior Court of New Jersey stated:

> It may seem "unfair" that [the husband] may ultimately refuse to provide a "get." But the unfairness comes from [the wife's] own sincerely-held religious beliefs. When she entered into the "ketubah" she agreed to be obligated to the laws of Moses and Israel. Those laws apparently include the tenet that if [the husband] does not provide her with a "get" she must remain an "agunah." That was [the wife's] choice and one which can hardly be remedied by this court.

Id. at 531.

6. *See* Samantha Raphelson, *When Leaving Your Religion Means Losing Your Children*, NPR (June 14, 2018), https://www.npr.org/2018/06/14/619997099/when-leaving-your-religion-means-losing-your-children ("People who leave the Hasidic community are often shunned by their family and friends, but they also are often forced to fight for their children."); *see also* Ausch, *supra* note 4. Not only is the community unsympathetic toward domestic violence, but elected officials have also "been accused of pandering to the Orthodox vote on issues like reporting sexual abuse." Dolsten, *supra* note 4.

Detached from outside influence, this ultra-insular community permits no television, no internet, and no contact with the secular world.[7] The only thing you have is your children, and they are the very thing you stand to lose by leaving, because not only will the community—including your own family—band together against you, but the state would sooner grant full custody to an absentee father than a mother who lapses in religious practice.[8] Far from being the stuff of nightmares, this is the reality for Chavie Weisberger, Etty Ausch, Sara Stewart, and countless other women who have gone "off the derech," that is, left the Hasidic community.[9]

Within the ultra-diverse boroughs of New York, Brooklyn has become home to over 330,000 Orthodox and Hasidic Jews.[10] The strength of their

7. David Shamah, *Rabbis Tell 60,000 in NY: Get Rid of the Internet if You Know What's Good for You*, TIMES ISR. (May 21, 2012), https://www.timesofisrael.com/rabbis-get-rid-of-the-internet-if-you-know-whats-good-for-you/ (quoting senior Rabbi Wosner, who rendered the Halachic decision that within the Hasidic community, "there [is] no justification for Internet use at home under any circumstances"); *see* Sarah Maslin Nir, *A Glimpse Inside the Hidden World of Hasidic Women*, N.Y. TIMES (Sept. 19, 2018), https://www.nytimes.com/2018/09/19/nyregion/a-glimpse-inside-the-hidden-world-of-hasidic-women.html (discussing restrictions on women in the Hasidic community).

8. *See* Sharon Otterman, *When Living Your Truth Can Mean Losing Your Children*, N.Y. TIMES (May 25, 2018), https://www.nytimes.com/2018/05/25/nyregion/orthodox-jewish-divorce-custody-ny.html. At the trial level, Weisberger lost custody of her children "largely because she had lapsed in raising them according to Hasidic customs." *Id.*; *see* Dolsten, *supra* note 6; Harriet Sherwood, *Agony of Orthodox Jews caught between two worlds*, GUARDIAN (Dec 2. 2018), https://www.theguardian.com/world/2018/dec/02/disobedience-film-orthodox-jews-lgbt-rights-rachel-weiez ("He was an important man in our community. My parents gave me hell on earth – they supported him, not me. My father made me feel ashamed of myself, disgusted with myself. I'll never get over that."); *see* cases cited *infra* note 16 and accompanying text; Josefin Dolsten, *Woman's Sexuality Cut from Hit Netflix Documentary About Leaving Hasidic Judaism,* TIMES ISR. (Mar. 9, 2018), https://www.timesofisrael.com/womans-sexuality-cut-from-hit-netflix-documentary-about-leaving-hasidic-judaism/ (describing Etty Ausch's attempt to leave the Hasidic community, in which "the Hasidic community band[ed] together, harassing her and raising money for her former husband's lawyer").

9. *See* Liana Satenstein, *Off the Beaten Path*, VOGUE (Mar. 8, 2018), https://www.vogue.com/projects/13541582/american-woman-style-after-ultra-orthodox-life/ ("When a woman comes out or is outed as not religious, she is at risk of being ostracized and having her children taken away from her."); Yoked, *supra* note 1; *see also* Ausch, *supra* note 6; Stewart, *supra* note 1. It is also noteworthy that men, as well as women, are in danger of losing their children for deviating from ultra-Orthodox practice. *See* Otterman, *supra* note 8 ("Julie F. Kay, a human rights lawyer in private practice, said she knew of at least one court that issued an order denying a formerly ultra-Orthodox father visitation rights because he showed up to a parental visit in jeans, which are not permitted to be worn by the ultra-Orthodox.").

10. Joseph Berger, *Uneasy Welcome as Ultra-Orthodox Jews Extend Beyond New York*, N.Y. TIMES (Aug. 2, 2017), https://www.nytimes.com/2017/08/02/nyregion/ultra-orthodox-jews-hasidim-new-jersey.html.

presence has morphed the previously liberal profile of the borough into a conservative enclave.[11] The insular community has strict guidelines for the way its women are expected to live.[12] Despite the notable differences between the secular West and its ultra-Orthodox pockets, there are many women who are not only content with their religious lifestyle, but thrive in it.[13] With that said, the heart of the legal issue rests not in Hasidism itself, but rather, the laws that make it difficult for women to stray from it.[14]

When a child custody dispute arises in Hasidic families, courts frequently defer to the provisions provided in a divorce settlement agreement, in conjunction with a "best interest of the child" analysis.[15] If the settlement agreement contains a religious upbringing clause—a document specifying that the children are to be reared in accordance with a particular religion—the court must give the document equitable weight in its multi-factored analysis to avoid violating the state's neutrality requirement under the Establishment Clause.[16] Further, under the Free Exercise Clause, parents have the right to practice a particular faith and direct their children's upbringing in accordance with that faith, thus, to mandate a religious (or nonreligious) upbringing constitutes government overreach.[17]

This Note explores the potential constitutional and contractual conflicts

11. *Id.*

12. *See generally* Stewart, *supra* note 1 (discussing the general expectations of women within the Hasidic community, including the required style of clothing and lack of autonomy). This includes wearing clothes that cover them from head to toe (including wrists and ankles), shaving their heads and wearing wigs, and having no permission to eat outside the home, or even to make contact with the outside world. *Id.*

13. *See* Nir, *supra* note 7 ("The women . . . 'take things that can be seen as gender roles and make it something special. They are making it their own, making it into something they are proud of.'").

14. *See* Raphelson, *supra* note 6.

15. *See* Sajid v. Berrios-Sajid, 902 N.Y.S.2d 146, 147 (App. Div. 2010) (stating "[t]here is no 'prima facie right to the custody of the child in either parent,'" and "[t]he essential consideration in any custody controversy is the best interests of the child" (quoting DOM. REL. L. §§ 70(a), 240(1)(a)); *see* cases cited *infra* note 16 and accompanying text.

16. *See* Weisberger v. Weisberger, 60 N.Y.S.3d 265, 274 (App. Div. 2017) (explaining a case where the Appellate Division of the New York Supreme Court overturned the lower court's decision to grant the paternal father sole residential custody, concluding that the religious upbringing clause of the divorce settlement agreement had improvidently been a "paramount factor" in the Court's analysis); *see also* Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 972 (9th Cir. 2011) (discussing the government's obligation to remain neutral when considering religion under the Establishment Clause).

17. U.S. CONST. amend. I; *see* S.E.L. v. J.W.W., 541 N.Y.S.2d 675, 677 (Fam. Ct. 1989).

implicated by enforcing religious upbringing clauses in child custody disputes.[18] More specifically, this Note examines constitutional violations in lower New York courts as a result of deferring to religious upbringing clauses.[19] Part II discusses the historical background to prevailing law.[20] Part III explores how precedential child custody cases within the jurisdiction have handled religion, both with and without religious upbringing clauses.[21] Part IV analyzes this by discussing whether the Establishment Clause and Free Exercise clause are violated by mandating religious practice.[22] Finally, Part V concludes by setting the constitutional standard for navigating religious upbringing documents in child custody disputes.[23]

II. BACKGROUND: DIVORCE SETTLEMENT AGREEMENTS AND THE FIRST AMENDMENT

When a Hasidic person files for divorce under New York law, either party to the marriage may invoke a declaratory judgment action to establish certain rights in a settlement agreement.[24] In such communities, the agreement is negotiated in a secular court, or in the Beth Din,[25] and if children are involved, such an agreement may include a religious upbringing clause.[26] The clause dictates that the children are to be raised in accordance with their then-existing religion, deviation from which risks removal from the aberrant parent.[27]

Although the child's best interest is the cornerstone of custodial analysis,

18. *See infra* Part IV, V.

19. *See infra* Part III, IV. This can be determined by comparing those decisions to appellate level decisions within the jurisdiction. *See id.*

20. *See infra* Part II.

21. *See infra* Part III.

22. *See infra* Part IV.

23. *See infra* Part V.

24. 43 N.Y. JUR. 2D DECLARATORY JUDGMENTS § 115.

25. The Beth Din is a Jewish court. *See* Beth Din, RABBINICAL COUNCIL OF CALIFORNIA, https://rccvaad.org/beth-din/ (last visited Jan. 5, 2019). The Beth Din offers a full range of Jewish court services, such as Jewish divorce and marriage services, similar to secular court. *Id.*

26. *See* Raphelson, *supra* note 6; Weisberger v. Weisberger, 60 N.Y.S.3d 265, 274 (App. Div. 2017). Such agreements are legally binding because New York courts deem these documents as enforceable contracts. *See id.* In these communities, such documents are typically signed at the time of divorce and may include other antenuptial arrangements, aside from the religious upbringing of the children. *See id.*

27. *See* Raphelson, *supra* note 6. While the law does not permit this standard for removal, lower New York courts have nonetheless mistakenly applied the law in shifting parental custody for violations of the settlement agreements. *See Weisberger*, 60 N.Y.S.3d at 274.

a problem emerges when his or her best interest is couched inside a religious framework.[28] That is, when maintaining what the courts refer to as the status quo (continued Hasidic practice) is "upheld [by the court] above all else."[29] Thus, whilst divorce settlements with such clauses are legally binding contracts, their enforcement raises the following key issues:[30] whether giving undue weight to the religious upbringing clause over other custodial factors violates the Establishment Clause, and whether compelling a parent to raise their child in a particular manner to gain custody violates the Free Exercise Clause.[31]

A. The First Amendment in Child Custody Disputes

Under the First Amendment, United States citizens are guaranteed freedom of religion.[32] The Supreme Court has implicitly bifurcated the Amendment into two clauses—the Establishment Clause and the Free Exercise Clause.[33] The Establishment Clause requires that the government "shall make no law respecting an establishment of religion."[34] Therefore, rather than adopting a policy in favor of church or state, the Establishment Clause divests the government of authority to do so.[35] The Free Exercise Clause, on the other hand, provides that "the government may not 'prohibit[] the free exercise' of religion."[36] Read in the context of child custody disputes, this means that the

28. *See* Raphelson, *supra* note 6.

29. *See id.*

30. *See* Bailey v. Mann, 895 N.E.2d 1215, 1217 (Ind. 2008). "Settlement agreements become binding contracts when incorporated into [a marriage] dissolution decree and are interpreted according to the general rules for contract construction." *Id.*

31. *See* discussion *infra* Part IV.

32. *See* discussion *infra* Part IV.

33. *See* Carl H. Esbeck, *Religion and the First Amendment: Some Causes of the Recent Confusion*, 42 WM. & MARY L. REV. 883, 897–98 (2001).

34. U.S. CONST. amend. I.

35. John C. Jeffries Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 292 (2001). Thus, short of embracing church-state jurisprudence, the Establishment Clause "merely reflect[s] a determination that the issue be settled locally." *Id.* at 293.

36. Newdow v. Peterson, 753 F.3d 105, 108 (2d Cir. 2014). Under the Free Exercise Clause, the *oversight* of a religious upbringing clause also impedes on the aggrieved parent's right to direct the child's upbringing according to their faith. *See* Wisconsin v. Yoder, 406 U.S. 205, 213–14 (1972) (discussing how the Free Exercise Clause is tied to the "traditional interest of parents with respect to the religious upbringing of their children," and finding that "the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society"). As such, to deprive a parent the right to raise their child by a particular faith

court may not prejudice the right of parents to direct the religious upbringing of their children.[37]

1. The Establishment Clause

Developing in the mid-twentieth century on the coattails of the Supreme Court's radical separation between church and state, the Establishment Clause intended to effectuate a constitutional prohibition on governmental aid to religious schools.[38] Since then, the breadth of separationist scope has extended to require, amongst other things, religious apathy in disputes over child custody.[39] Accordingly, two relevant questions emerge.[40] First, to what extent may the court consider religion in a custody dispute when no contractual provision exists to determine his or her upbringing; and second, when such a contract does exist, how much weight may a court afford it.[41]

When no contract exists, in the form of a divorce settlement agreement or otherwise, the court's paramount consideration is the "best interest" of the child.[42] As part of the "best interest" analysis, the court may or may not consider religion.[43] When a divorce settlement agreement exists with a religious

would constitute an equally egregious constitutional oversight. *See id.*

37. *See Wisconsin*, 406 U.S. 205 at 233. While this Note focuses on the Free Exercise Clause in conjunction with the Establishment Clause, the relationship between free exercise rights and parents' Fourteenth Amendment substantial due process right to direct the upbringing of their children have historically been closely linked—sometimes even confused. *See* Jay S. Bybee, *Substantive Due Process and Free Exercise of Religion: Meyer, Pierce, and the Origins of* Wisconsin v. Yoder, 25 CAP. U. L. REV 887, 891 (1996). In the interest of brevity, this Note does not discuss any Fourteenth Amendment issues. *See infra* Part IV.

38. *See* MICH. L. REV. ASS'N, *The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interest Equation*, 82 MICH. L. REV 1702, 1704 (1984).

39. *See id.* at 1702.

40. *See id.*; *infra* Part IV.

41. *See infra* Part IV; *see* cases cited *supra* note 16 and accompanying text. Put another way, the second question asks in what way does the contract shape the scope of the analysis. *Compare* MICH. L. REV. ASS'N, *supra* note 38, at 1702 (contemplating religion in child custody disputes when no contract exists), *with* Weisberger v. Weisberger, 60 N.Y.S.3d 265, 275 (App. Div. 2017) (overturning the lower court's decision to grant the paternal father custody after excess weight was given to the religious upbringing clause).

42. *See* MICH. L. REV. ASS'N, *supra* note 38, at 1702. Judges are typically awarded broad discretion to determine what constitutes the best interest of the child. *Id.*

43. *Id.* Although six statutes require religion to be considered in a child custody dispute, it is otherwise typically within the court's discretion to consider religion as a factor, absent a contract that compels it to do so. *Id.*

upbringing provision, however, the court is *obligated* to consider it under contract law, presenting greater difficulty in determining the extent of its influence and pitting contractual provisions against constitutional law.[44] In both instances, however, the overarching evil that the Establishment Clause seeks to avoid is government overreach in private, religious affairs.[45]

To avoid such an evil, the Establishment Clause regards denominational preference (lending favor to one religion competing with another) as "suspect and . . . subject to strict scrutiny."[46] The Supreme Court has routinely stated that the Establishment Clause also prohibits the government from favoring religion to nonreligion.[47] In child custody cases, the constitutionality of preferring a religious parent to a nonreligious parent can be analyzed under the *Lemon* test.[48] The *Lemon* test requires that: (1) the law "have a secular legislative purpose"; (2) its principle effect "neither advance[s] nor inhibit[s] religion"; and (3) it may "not foster 'an excessive government entanglement with religion.'"[49] In application, it becomes apparent that favoring the religious parent almost always violates the Establishment Clause based on a failure to meet the second prong.[50] That is, since choosing a custodian on the grounds of religious preference has the proscribed effect of advancing religion, it typically does not pass constitutional muster under the *Lemon* test.[51] In sum, courts may consider a religious upbringing clause as a factor in child custody disputes, but may not give it undue weight.[52]

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44. *See* cases cited *supra* note 16 and accompanying text. These considerations will be fleshed out in Part IV of this Note. *See infra* Part IV.

45. U.S. CONST. amend. I; *see* Jason S. Marks, *What Wall? School Vouchers and Church-State Separation After Zelman v. Simmons-Harris*, 58 J. MO. B. 354, 362 (2002) ("[T]he Establishment Clause is inherently anti-majoritarian, designed to protect religious minorities from the tyranny of the majority.").

46. *See* MICH. L. REV. ASS'N, *supra* note 38, at 1703–04. This strict scrutiny standard emerges in *Larson*, discussed below. *See infra* Part III.B.

47. *See* MICH. L. REV. ASS'N *supra* note 38, at 1707.

48. *Id.* at 1708; Lemon v. Kurtzman, 403 U.S. 602 (1971). The *Lemon* test, however, does not exclusively apply to child custody cases, as depicted in *Larson*. *See* case discussion *infra* note 76.

49. *See* MICH. L. REV. ASS'N, *supra* note 38, at 1708.

50. *Id.* at 1719.

51. *Id.* There is an exception to this rule under *Larson*. *See* discussion *infra* Section III.B, Part IV.

52. *See* cases cited *supra* note 16 and accompanying text. Although the Establishment Clause does not preclude the government from assessing religion in a multi-factored analysis, it does "require[] . . . 'governmental neutrality'—'neutrality between religion and religion, and between religion and nonreligion.'" Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 971 (9th Cir. 2017) (quoting McCreary Cnty. v. ACLU, 545 U.S. 844, 860 (2005)). Therefore, giving undue weight to a religious

2. The Free Exercise Clause

Juxtaposed to the Establishment Clause, the Free Exercise Clause states that Congress shall make no laws "respecting an establishment of religion, *or prohibiting the free exercise thereof.*"[53] The Supreme Court has noted that the "free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."[54] Entrenched in Free Exercise jurisprudence is the notion that, in a child custody dispute, the non-custodial parent's right to exercise her religion—or no religion at all—cannot be abated by the court.[55] Deferring to a religious upbringing contract, then, strips a party of their Free Exercise right by admonishing the parent to practice the designated faith in order to maintain custody of their children.[56] In this way, a mother who lapses in religious practice by, for example, allowing her children to watch television when the community strictly prohibits it, runs afoul of the contract and risks a custody war.[57] Because the Free Exercise Clause specifically protects individuals from religious (or secular) restraint, the government cannot, at its behest, coerce a parent into exercising a particular faith to maintain unsupervised visitation rights.[58]

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upbringing clause violates the Establishment Clause. *Id.* Giving the religious agreement undue weight essentially means making religion a *paramount* factor—rather than a non-determinative factor—in assessing the best interest of the child, as the trial court mistakenly did in *Weisberger*. *See infra* Section III.C.1.

53. U.S. CONST. amend. I (emphasis added). Under the Fourteenth Amendment, parents also have a substantive due process right to rear their children free of state interference, absent a showing of harm to the child. Troxel v. Granville, 530 U.S. 57, 65 (2000) ("The [Fourteenth Amendment's Due Process] Clause also includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.' . . . [T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court." (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (2000))). In the interest of brevity, however, this Note does not discuss any Fourteenth Amendment issues. *See infra* Part IV.

54. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 877 (1990).

55. *See* S.E.L. v. J.W.W., 541 N.Y.S.2d 675, 677 (Fam. Ct. 1989).

56. *See id*.; Otterman, *supra* note 8 (discussing *Weisberger v. Weisberger*, 60 N.Y.S.3d 265 (App. Div. 2017), where the court noted that Ms. Weisberger's constitutional rights were violated "by requiring her to pretend to be ultra-Orthodox around her children, even though she was no longer religious, in order to spend unsupervised time with them").

57. Otterman*, supra* note 8. The Judge in *Weisberger* asked Ausch—whose children were placed in custody of relatives—a series of question about her general fitness as a parent, including whether the fuzzy socks she purchased for her children were related to Christmas, and whether she permitted her children to watch a Christmas show. *Id.*

58. *Granville*, 530 U.S. at 57; *see* Otterman, *supra* note 8 (explaining that in *Weisberger*, the New

B. Contractual Issues

The counter to this premise—that the government cannot mandate a parent to act in accordance with a particular faith—is that the lamenting party contracted away her constitutional rights when agreeing to the divorce settlement.[59] While a party may, on occasion, waive her constitutional rights, defenses nonetheless apply to the contract's enforceability when it is clear that one party was not privy to the contract's terms.[60] Lani Santo, a director of social services in the Brooklyn borough, explains that "in almost every case of individuals[61] who are choosing to leave [the Hasidic community] . . . . [t]here's almost always a contested divorce. . . . [In which] people are signing things that are not explained to them."[62] Furthermore, unlike certain individual rights, because the Establishment Clause is a structural restraint on government, it may not be contracted away.[63] For example, in child custody disputes where a court unduly deferred to the religious upbringing

York Appellate Court ruled that "[the lower court] had erred in making religious observance the paramount factor when deciding custody").

59. Jason S. Thaler, *Public Housing Consent Clauses: Unconstitutional Condition or Constitutional Necessity?*, 63 FORDHAM L. REV. 1777, 1788 (1995) ("Although it is possible to contract away certain constitutional rights, the agreement must be voluntary. Courts routinely hold that an agreement is voluntary unless it is the product of duress.").

60. *See id.* at 1789.

61. Although this could feasibly apply to either gender, prevailing controversies consistently depict a Hasidic woman who is forestalled from leaving her husband by a communal effort to bolster his legal platform and leave her unsupported. *See* Raphelson, *supra* note 6 and accompanying text.

62. Raphelson, *supra* note 6; *see also* Otterman, *supra* note 8. Discussing the religious upbringing clause in her divorce settlement agreement, Weisberger states, "I don't even remember seeing it." Otterman, *supra* note 8. If such an individual can prove that (s)he was taken advantage of, (s)he may be relieved of the improvident contract by presenting a valid defense, such as duress, unconscionability, or undue influence. *See generally* 17 C.J.S. Contracts § 3 (discussing the "effect of unconscionability or other defect in contract formation"). Although these examples provide defenses to the contract's enforceability, there may also be an argument that no contract was formed for lack of mutual assent, since "an offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he is unaware, contained in a document whose contractual nature is not obvious." Specht v. Netscape, 306 F.3d 17, 30 (2d Cir. 2002) (citation omitted). Without mutual assent, a contract cannot be formed, since "[m]utual manifestation of assent . . . is the touchstone of contract." *Id.* at 29. Consequently, a party to a contract who has not had the terms explicitly explained to them may also present an argument that the contract was never initially formed. *Id.* at 29–30.

63. *See* Jessica Powley Hayden, *The Ties that Bind: The Constitution, Structural Restraints, and Government Action Overseas*, 96 GEO. L.J. 237, 243–44 (2007).

clause, a party's consent to the agreement would not mitigate its unconstitutional effect, as a party cannot consent to government overreach.[64]

In sum, even if the religious upbringing clause is proportionately weighed, its enforcement may still constitute a violation of the custodian's Free Exercise right to parent, and, if a waiver challenge is presented, a valid defense to the contract's enforcement may apply.[65] On the other hand, if the religious clause is disproportionately weighed, the structural restraint imposed on the government by the Establishment Clause survives a waiver challenge, since such constraints may not be contracted away.[66]

III. CHILD CUSTODY DECISIONS IN PRECEDENTIAL NEW YORK CASES

Over time, New York Courts have reached contradictory decisions in child custody cases, both with and without religious upbringing clauses.[67] Identifying the cause of this schism requires a review of neutral principles of law, the "best interest of the child" analysis, strict scrutiny standards, and relevant case law.[68]

A. Neutral Principles of Law and "Best Interest of the Child" Analysis

When adjudicating cases that involve religious disputes, neutral principles of law typically govern in order to avoid offending the First Amendment.[69] This means that courts tend to apply "objective, well-established principles of secular law to the issues."[70] In this way, judicial involvement is

64. *Id.*

65. *Id.*

66. *Id.*

67. *See infra* Section III.A–D. The most recent included decision with a religious upbringing clause is *Weisberger*. *See* Section III.C.1. The most recent included decision without a religious upbringing clause is *Ausch*. *See* Section III.D.1.

68. *Compare infra* Section III.C (examining child custody cases in New York with religious upbringing clauses), *with infra* Section III.D (examining child custody cases in New York without religious upbringing clauses).

69. Congregation Yetev Lev D'Satmar, Inc. v. Kahana, 879 N.E.2d 1282, 1285 (N.Y. App. Div. 2007) ("In [applying neutral principals of law], courts may rely upon internal documents, such as a congregation's bylaws, but only if those documents do not require interpretation of ecclesiastical doctrine. Thus, judicial involvement is permitted when the case can be 'decided solely upon the application of neutral principles of . . . law, without reference to any religious principle.'" (quoting Avitzur v. Avitzur, 446 N.E.2d 136, 138 (N.Y. App. Div. 1983))).

70. *Id.* at 1285.

justified when the case is decided "without reference to [any] religious principles."[71] To avoid implicating Establishment Clause concerns, therefore, the court must instead defer to a "best interest of the child" analysis.[72] This means that when a religious upbringing clause exists in a child custody dispute, courts in New York must not contemplate the propriety of the religious practice, nor the appropriate exposure to it, but instead the conduct of each parent in raising the children, particularly in light of the consistency provided in the child's upbringing.[73]

In assessing the best interest of the child, courts in New York typically consider a set of non-exhaustive factors, including the quality of the home, the quality of parental guidance, the ability to provide for the child's intellectual and emotional development, and financial status.[74] When religion is implicated in the custody dispute, it may be considered alongside other factors; however, it may not by itself be the determinative factor.[75]

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71. *Id.*

72. Ervin R. v. Phina R., 717 N.Y.S.2d 849, 852 (Fam. Ct. 2000).

73. *Id.* Within their analysis, courts may consider religion—or a religious upbringing clause—as one of the factors to determine what is in the best interest of the child. *Id.* In Friederwitzer v. Friederwitzer, 432 N.E.2d 765, 767 (N.Y. 1982), the New York Court of Appeals stated that "[t]he only absolute in the law governing custody of children is that there are no absolutes." *Id.* In that case, the Appellate Court affirmed the lower court's decision to award custody to the father because the mother was more interested in her own social life than her children, and because the mother's actions "confused the children and [were] contrary to their religious beliefs and detrimental to their religious feeling." *Id.*

74. *See* Sajid v. Berrios-Sajid, 902 N.Y.S.2d 146, 147 (App. Div. 2010).

75. *See* Gribeluk v. Gribeluk, 991 N.Y.S.2d 117, 118 (App. Div. 2014). Typically, religion is at issue and warrants contemplation in the best interest of the child analysis when the child has developed actual and specific ties to the religion, and those needs are consequentially best served by the practicing parent. *Id.* By itself, however, religion is typically not enough to swing the pendulum in favor of one parent, since credibility determinations play such a pivotal role in determining the best interest of the child. *Id.* In cases where religion *is* the sole determining factor of a child custody dispute, an Establishment Clause violation challenge would likely ensue. *See* U.S. CONST. amend. I. This is the chief evil sought to be avoided by the First Amendment's separation of church and state. *See id.* Further shaping the scope of the child custody analysis is Article 10 of New York's Family Court Act. N.Y. FAM. CT. ART. 10. The statute provides that a preliminary removal from the custodial parent is justified only by a showing of imminent danger or harm to the child. *Id.* In this way, religion as a determinative factor must defeat Article 10's extraordinarily high standard by demonstrating that abstinence from faith would constitute such imminent harm to the child as to justify removal from the non—or less—religious parent. *See id.* Typically, the standard for imminent danger is fairly high, and cases where only *some* harm is demonstrated are insufficient to pass statutory muster. *See* Nicholson v. Scoppetta, 820 N.E.2d 840, 852–53 (N.Y. 2004). There, a group of mothers brought action after a trial court granted removal of their children solely because the mothers had not prevented the children from witnessing the domestic violence that they were victims of. *Id.* at 842–43. The Court

B. Larson*'s Strict Scrutiny Test*

In *Larson v. Velente*, the Supreme Court introduced a new strict scrutiny test, holding that denominational preference is impermissible under the Establishment Clause except when it ties to a compelling government interest.[76] While the parameters of this compelling interest are not clearly delineated, its attenuated nature can be inferred from the exercise of strict scrutiny—the highest standard of review—underpinned by the Supreme Court's conviction that government regulation should be rigorously scrutinized when it infringes on a protected liberty.[77] In short, the Supreme Court concluded that the Establishment Clause prohibited the preference of one denomination over another, except in the rare cases where denominational biases were justified by a "close[] fit[]" to a compelling state interest.[78]

C. Child Custody Disputes with Religious Upbringing Agreements

In the following two cases, the courts grappled with their latitude to interfere in predetermined contractual arrangements surrounding the upbringing

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of Appeals of New York found that witnessing domestic abuse by itself does not give rise to a presumption of injury. *Id.* at 854 ("[T]he risk of emotional injury—caused by witnessing domestic violence . . . must be a *rare circumstance* in which . . . *the danger [is] so great* that emergency removal would be warranted." (emphasis added)).

76. 456 U.S. 228 (1982); *see* Jeremy Patrick-Justice, *Strict Scrutiny for Denominational Preferences: Larson in Retrospect*, 8 N.Y. CITY L. REV. 53, 54–55 (2005). Justice Brennan delivered the opinion of the court in *Larson* and began his analysis by stating that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson*, 456 U.S. at 244. In that case, Pamela Velente sued the state of Minnesota for requiring, under "the Act," that all registered charitable organizations soliciting money file annual disclosure reports with the Minnesota Department of Commerce (the Department). *Id.* at 231. The Department could then withdraw or deny any organization that engaged in "fraudulent, deceptive, or dishonest" practices. *Id.* Velente argued that the Act infringed on the Establishment Clause and violated the *Lemon* test both by having no secular legislative purpose, and by having the proscribed effect of inhibiting religion. *Id*. at 251–52. This is because some churches were subjected to "far more rigorous requirements than others." *Id.* at 258 (White, J., dissenting). While the District Court found this requirement violated the second *Lemon* test by inhibiting religion, the Court of Appeals found that the requirement violated the first *Lemon* test by failing to have a secular legislative purpose. *Id.* at 258–59.

77. *See* Mariam Morshedi, *Levels of Scrutiny*, SUBSCRIPT L. (Mar. 6, 2018), https://www.subscriptlaw.com/blog/levels-of-scrutiny.

78. *See Larson*, 456 U.S. at 244. What constitutes a close fit to a compelling state interest in child custody cases with religious upbringing clauses is fleshed out in Part IV of this article; however, in sum, this typically involves the state's concern for the threatened well-being of the child. *See infra* Part IV.

of the parties' children.[79] In both cases, the contracts were ultimately left intact absent a showing of harm to the children.[80] In *Weisberger v. Weisberger*, the appellate court corrected the lower court's constitutional blunder of shifting parental custody—thereby gutting the antenuptial contract—without a showing that harm justified modification of the agreement.[81] In *Spring v. Glawon*, the court compelled the mother to remove her son from a religious school on the grounds that it violated a (non)religious upbringing clause, finding that she failed to prove removal would be sufficiently harmful to justify modification of the agreement.[82]

1. *Weisberger v. Weisberger* (2017)

In 2015, the Supreme Court of Kings County, New York awarded Naftali Weisberger sole legal and residential custody of his children.[83] Chavie Weisberger, Naftali's ex-wife and mother to their three children, was awarded supervised therapeutic visitation after failing to comply with a religious upbringing document that required her to diligently observe the Hasidic faith.[84] The

79. *See* Weisberger v. Weisberger, 60 N.Y.S.3d 265 (App. Div. 2017); Spring v. Glawon, 454 N.Y.S.2d 140, 141 (App. Div. 1982).

80. *See Weisberger*, 60 N.Y.S.3d at 274–75; *Spring*, 454 N.Y.S.2d at 141–42.

81. *See Weisberger*, 60 N.Y.S.3d at 275. The only justification for the state's removal of the children from their mother's custody—as stipulated in the antenuptial agreement—would have been to demonstrate that remaining with their mother would cause the children harm. *Id.* at 275. Nothing in the record demonstrated that the children in that case would be harmed by remaining with their mother. *Id.* The holding of *Weisberger* may be somewhat confusing in terms of the contract-constitution battlefield due to its dual rationales. *See id.* Since the antenuptial agreement stated that the children both would remain with their mother (Chavie) *and* be reared in accordance with the Hasidic faith, the contract had to be enforced unless (1) it could be shown that remaining in Chavie's custody would prove harmful to the children, *and*/*or* (2) it could be shown that continuing Hasidic practices would prove harmful to the children. *Id.* Since the father, Naftali, was unable to prove that it would be harmful to the children to remain with Chavie, removal was unjustified. *Id.* at 175–76. However, since Chavie failed to prove that continued practice of the Hasidic faith would be harmful to the children, the religious upbringing clause was enforced. *Id.* at 275. Therefore, the state's position of non-interference absent a showing of harm was—by constitutional standards—correctly upheld by the appellate court in *Weisberger*. *See id.*

82. *Spring*, 454 N.Y.S.2d at 142. Thus, state interference in religious upbringing agreements is unjustified unless a contracting party can demonstrate that enforcement of the contract would harm the child. *See id.*; *Weisberger*, 60 N.Y.S.3d at 275. This standard is in line with Establishment Clause jurisprudence. U.S. CONST. amend. I.

83. *Weisberger*, 60 N.Y.S.3d at 272. This included final decision-making authority over dental, medical, and mental health issues. *Id.*

84. *Id.*

parties divorced in 2009 and signed a divorce settlement contract agreeing to joint legal custody of the children, while Chavie would have primary residential custody.[85] Incorporated into the judgment was a stipulation directing the parents to raise the children in accordance with Hasidic customs "in all details."[86]

In 2012, Naftali moved to alter the stipulation of settlement so as to be granted sole custody of the children, as well as to compel Chavie to act in accordance with "Jewish Hasidic practices of ultra-Orthodoxy at all times."[87] In support of his motion, Naftli alleged that Chavie violated the religious upbringing clause of the settlement by coming out publicly as a lesbian and allowing the children to deviate from religious practice.[88]

During the custody battle in the Brooklyn Supreme Court, Judge Eric Prus questioned Chavie for several days on her deviation from the ultra-Orthodox faith.[89] Ultimately, the court determined that Chavie's transition had caused a radical change of circumstances for the children, and it thus modified the divorce agreement so as to award Naftali temporary residential and legal custody.[90] The court also granted the father's motion to compel Chavie to practice full observance of the Hasidic faith.[91]

Beginning its analysis, the Appellate Division of the Supreme Court of

85. *Id.* at 268. The divorce was implemented after Chavie confessed to being sexually attracted to other women. *Id.*

86. *Id.* This included both inside and outside of the home, in a manner that was "compatible with that of their families." *Id.* The court also granted Naftali decision-making authority over which school the children would attend, while Chavie was responsible for getting the children to school in a timely manner and ensuring all their needs were provided for. *Id.*

87. *Id*. This included "sole legal and residential custody." *Id.* Naftali alleged that Chavie's "radically changed . . . lifestyle . . . . [D]isparaged the basic tenets of Hasidic Judaism in front of the children," and for that reason, he moved to compel Chavie to act in accordance with the Hasidic faith "during any period in which she ha[d] physical custody of the children and at any appearance at the children's school" in order to comply with the religious upbringing document. *Id.* at 268.

88. *Id.* at 269. This involved "allow[ing] the children to wear non-Hasidic clothes, permitt[ing] them to violate the Sabbath and kosher dietary laws, and referr[ing] to them by names that were not traditionally used in the Hasidic community." *Id.*

89. *See* Otterman, *supra* note 8. Judge Prus's questions included whether she permitted the children to watch a Christmas video, whether she included Easter eggs as part of a Jewish holiday, and whether she used English nicknames for them. *Id.*

90. Weisberger v. Weisberger, 60 N.Y.S.3d 265, 272 (App. Div. 2017). The court described this as a transition toward a "more progressive, albeit Jewish, secular world." *Id.*

91. *Id.* at 269. The court demanded that Chavie practice "'full religious observance in accordance with the [Hasidic] practices of Emunas Yisroel in the presence of the children,' and 'in . . . the community . . . [and] dress in the [Hasidic] modern fashion.'" *Id.*

New York noted that modifying an existing custody agreement required a "showing that there had been a change in circumstances such that a modification [was] necessary to ensure the continued best interests and welfare of the child[ren]."[92] The Appellate Division also delineated a non-exhaustive list of factors that were relevant for determining what the best interest of the children would be.[93]

Although the court conceded that a modification of the settlement agreement was warranted by a change in the circumstances, it nonetheless found that the decision to award Naftali Weisberger sole legal and residential custody of the children "lacked a sound and substantial basis in the record."[94] With regards to Chavie, the court concluded that directing her to practice full religious observance of Hasidic practices during periods of custody was

92. *Id.* at 273. "The best interests of the child[ren]," the court noted, are to be "determined by a review of the totality of the circumstances." *Id.* (quoting Matter of Preciado v. Ireland, 2 N.Y.S.2d 594 (App. Div. 2015)). This standard is reminiscent of the neutral principles standard as upheld in *Spring*, and the compelling state interest upheld in *Larson*, in which a contract between two parties regarding their children's upbringing will be scrutinized through neutral application of law unless and until harm to the child is threatened. *See* Spring v. Glawon, 454 N.Y.S.2d 140, 142 (App. Div. 1982); *see also* Larson v. Valente, 456 U.S. 228, 247–48 (1982). Here, the contract between the parties stipulated that Chavie would have legal and residential custody over the children, and that both parties would raise the children in accordance with the Hasidic faith. *Weisberger*, 60 N.Y.S.3d at 268. Deviation from this practice, then, would not justify removal, but instead a compulsion to enforce the document—as ordered by the court on appeal. *See id.* at 275. As stated by the court, modification of this agreement would require a showing of harm to the children. *Id.* at 273. Since it could not be shown that remaining in the mother's custody would be harmful to the children, there was no justification on the record for modifying the custody agreement. *Id.* at 274–75. In this way, the lower court erred in removing the children from Chavie's custody, instead of enforcing the religious upbringing document. *See infra* Part IV.B.

93. *Weisberger*, 60 N.Y.S.3d at 273. These factors included: (1) "the quality of the home environment"; (2) each parent's ability "to provide for the child[ren]'s emotional and intellectual development"; (3) each parent's financial stability; (4) each party's relative fitness as a parent; and (5) the effect a change in custody would have on the "child[ren]'s relationship with the other parent." *Id.* The court also noted that the mother's sexual orientation, which was raised at the hearing, required neutrality from the courts, in order for the focus to remain on the best interests of the welfare of the children. *Id.* The court also stated that the lower court's determinations of the child's best interest are afforded great weight and are not to be "disturbed unless they lack a sound and substantial basis on the record." *Id.* (quoting Trinagel v. Boyar, 893 N.Y.S.2d 636 (App. Div. 2010)).

94. *Id.* at 273–74. Supporting its view, the court noted that Naftali was unable to demonstrate that awarding him sole custody of the children was in their best interest because their mother, Chavie, had been their "primary caretaker since birth." *Id.* at 274. Moreover, the court determined that the children's intellectual and emotional development was strongly tied to their relationship with their mother. *Id.*

wholly improper.[95] Relying on the *Lemon* Test in its analysis, the court reasoned that a person may not be compelled to adopt a particular religious lifestyle at the behest of the court, as to do so would be a constitutional violation.[96] Further, the court found that there had been no showing that the mother's newly adopted lifestyle was in anyway harmful to the children's well-being.[97]

The court ultimately reasoned that the best interest of the children was to continue observance of the Hasidic faith, but to remain primarily with their mother, as per the agreement.[98] Finally, the court modified the religious upbringing clause to permit "each parent to exercise [their] discretion while the children [were] in [their] care."[99]

2. *Spring v. Glawon* (1982)

In *Spring v. Glawon*, the Appellate Division of the Supreme Court enforced a religious upbringing clause stating that the child should be raised

95. *Id.* at 275. The court stated that it was "wholly inappropriate to use supervised visitation as a tool to compel the mother to comport herself in a particular religious manner." *Id.*

96. *Id.*; *see* Lemon v. Kurtsman, 403 U.S. 602, 612–13 (1971). To that end, the court explained that "a religious upbringing clause should not, and cannot, be enforced to the extent that it violates a parent's legitimate due process right to express oneself and live freely." *Weisberger*, 60 N.Y.S.3d at 275. To support its reasoning, the court cited to *Lee v. Weisman*, 505 U.S. 577, 599 (1992), where the Supreme Court held that a court could not "compel a student to participate in a religious exercise," and to include clergymen offering prayer as part of a graduation ceremony was not consistent with Establishment Clause of the First Amendment.

97. *Weisberger*, 60 N.Y.S.3d at 275. This showing of harm is vital for Establishment Clause analysis, since *Larson* provides that the only exception for judicial interference in these categories of disputes—discussed at length in Part IV—is potential harm to the child. *See infra* Part IV. Since there was no showing of harm, the religious upbringing clause maintained its force in this case, with a modification so as to permit Chavie to extricate herself from the contract's rigorous religious demands. *Weisberger*, 60 N.Y.S.3d at 275.

98. *Id.* (reasoning that "the maintenance of the status quo is a positive value which, while not decisive in and of itself, is entitled to *great* weight" (emphasis added) (citing Matter of Moorehead v. Moorehead, 602 N.Y.S.2d 403, 405 (App. Div. 1993))). Additionally, the court directed Chavie to "make all reasonable efforts" to ensure that the children comply with Hasidism, be it in response to direction from the father or the school. *Weisberger*, 60 N.Y.S.3d at 276. Naftali was awarded final decision-making authority over the children's education and upbringing as it pertained to the Hasidic religion while in his custody. *Id.* Additionally, the court found it to be in the best interest of the children to keep a kosher home whilst in custody of both the mother and the father. *Id.*

99. *Id.*

without religion, absent express written consent from both parties to the contrary.[100] Dennis Spring, who is Jewish, and Adrienne Glawon, who is Catholic, married in 1968.[101] Following their divorce fifteen months later, Glawon was awarded custody of their son, Evan, with Spring retaining certain parental rights.[102] The judgment contained a stipulation that the child should have no religious upbringing without express written consent by both parents.[103] In 1981, Evan reached school age, and Glawon enrolled him into St. Joseph's Hill Academy ("St. Joseph's") over Spring's objection.[104] Consequentially, Spring brought a motion to both enforce the (non)religious upbringing clause and modify the agreement to award joint custody to both parents.[105]

In its analysis, the court reaffirmed precedential holdings demonstrating that the court's position was one of non-interference, and as such, the court could not be compelled to intervene unless there was a showing that the "moral, mental[,] and physical conditions [were] so bad as seriously to affect the health or moral[ilty] of [the] children."[106]

Glawon, the defendant-mother, contended in opposition that it was in Evan's best interest to attend St. Joseph's, but the burden was on her to prove that it would not be in Evan's best interest to *remove* him from St. Joseph's, in other words, that it would be harmful to remove him.[107] The court concluded that the agreement manifested between the parents as to the degree of religious upbringing of the child was ultimately best left intact, absent a showing that enforcement would prove harmful.[108] For that reason, Evan was removed from St. Joseph's and the custody agreement between the parties was left unchanged.[109]

100. Spring v. Glawon, 454 N.Y.S.2d 140, 141 (App. Div. 1982).

101. *Id.* Their son, Evan, was born in 1975. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* St. Joseph's was a Roman Catholic parochial school. *Id.*

105. *Id.*

106. *Id.* at 142 (quoting People *ex rel.* Sisson v. Sisson, 2 N.E.2d 660, 661 (N.Y. 1936)). Furthermore, the court noted that precedential cases had consistently upheld the validity of religious upbringing agreements, and that the party seeking to avoid or modify such an agreement has the burden of proving that its enforcement is not in the best interest of the child. *Id.*; *see also* S.E.L. v. J.W.W., 541 N.Y.S.2d 675, 679 (Fam. Ct. 1989).

107. *Spring*, 454 N.Y.S.2d at 142. To support this contention, "she submitted a comparison of reading scores" between St. Joseph's and other local schools, along with testimony about her experience as a public-school teacher for thirteen years. *Id.* at 141–42.

108. *Id.* at 142.

109. *Id.*

D. Child Custody Disputes Without Religious Upbringing Agreements

Decided thirty-four years apart, the following two cases reach slightly different holdings in child custody disputes without a religious upbringing clause.[110] In *Ausch*, the children were removed from their mother despite a lack of finding that it would be harmful to remain in her care.[111] In *Aldous*, the appellate court found that the lower court had impermissibly entangled matters of church and state by allowing its credibility determination of the father's religion to resolve the custody dispute in the mother's favour.[112]

1. *Ausch v. Ausch* (2018)

In 2016, The Supreme Court of King's County placed the children of Etty Ausch, Appellant, in temporary custody of nonparty relatives.[113] Etty initiated her departure from the Hasidic community one year prior to the custody hearing, alleging abuse by her ex-husband, Eluzer (Respondent).[114] When Etty

110. *Compare* Ausch v. Ausch, 67 N.Y.S.3d 489, 489 (App. Div. 2018) (issuing a temporary order removing the children from the mother and placing them with nonparty relatives), *with* Aldous v. Aldous, 473 N.Y.S.2d 60, 62 (App. Div. 1984) (awarding permanent custody to the mother of the children). While these two cases have reached different holdings, it is not necessarily accurate to describe them as being directly contradictory, since they both involve a unique set of facts, and the *Ausch* materials make it difficult to deduce how much consideration was given to the mother's deviation from religion in arriving at the final custody determination. *See Ausch*, 67 N.Y.S.3d at 489.

111. Brief for Appellant at 33, Ausch v. Ausch, 67 N.Y.S.3d 489 (App. Div. 2018) (No. 2016-09081).

112. *Aldous*, 473 N.Y.S.2d at 62.

113. *Ausch*, 67 N.Y.S.3d at 489. The Supreme Court is the lowest court in New York. *Id.* The Appellate Division here references the lower court's decision to temporarily place custody of the children with nonparty relatives. *Id.* Notably, the presiding Justice in this case, as well as in *Weisenberg*, is Justice Prus. *Id.* Prus is an observant ultra-Orthodox Jew, and is often remarked as being "willing[] to wade deep into the details of religious practice in his Downtown Brooklyn courtroom." Otterman, *supra* note 8. Currently, three of Etty's children reside with her ex-husband, while the other four live with relatives. *See* Josefin Dolsten, *Why Did Netflix Cut 'I'm Gay' From Documentary About Ex-Hasids?*, FORWARD (Mar. 5, 2018), https://forward.com/life/faith/395816/why-did-netflix-cut-im-gay-from-documentary-about-ex-hasids/. Etty motioned to vacate the order and regain custody of her children, but the court dismissed the motion on appeal. *Ausch*, 67 N.Y.S.3d at 489.

114. *See* Otterman, *supra* note 8. During the trial, Etty's family and close friends attended to testify against her. *Id.* Those who have recently departed from Hasidism have opined that the community "has become more organized in how it aids the religious parent and ostracizes the parent leaving the fold." *Id.* Like some of the aforementioned women, Etty's changed lifestyle—including divergence from religious practices and exploration of homosexuality—was the subject of investigation at the proceeding. *See Raphelson,* supra note 6 ("In her custody hearing, she faced a series of religiously pointed questions including one about fuzzy socks she bought for her children: Were they related to

and Eluzer first married and had children, both parties were Orthodox Jews.[115] In 2014, however, Etty was hospitalized for major depressive disorder, after which point Eluzer separated the children by placing them in five different relative's homes.[116]

In 2015, Eluzer commenced matrimonial proceedings in the County of King's Supreme Court "on the grounds of irretrievable breakdown of the marital relationship."[117] During the proceeding, Dr. Adam Raff, the assigned expert forensic psychiatrist, testified that the children would "suffer emotionally and developmentally if they were separated from their mother."[118] Nonetheless, the Court issued a temporary order removing the three oldest children

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Christmas because they were dotted with snowmen?"). Interestingly, in 2017 the appellate court in *Weisberger* admonished Justice Prus and the lower courts to remember that mandating a parent to act religiously is unconstitutional. *See* Otterman, *supra* note 8. It would seem that this admonition was ineffective, since only one year later, the same judge in the same court denied Etty's appeal for custody for failure to maintain religious practice. *Id.*

115. Brief for Respondent at 9, Ausch v. Ausch, 67 N.Y.S.3d 489 (App. Div. 2018) (No. 2016-09081).

116. Brief for Appellant at 14, *Ausch*, 67 N.Y.S.3d 489 (No. 2016-09081). Eluzer alleged that Etty suffered some post-partum difficulties after having seven children in eight years. Brief for Respondent at 9, *Ausch*, 67 N.Y.S.3d 489 (No. 2016-09081). Etty, on the other hand, attributes the source of her anxieties to the alleged emotional, physical, and sexual abuse she experienced in her marriage. Brief for Appellant at 12, *Ausch*, 67 N.Y.S.3d 489 (No. 2016-09081). Etty also alleged that Eluzer was physically and verbally abusive towards his children. *Id.* This includes "pinching and hitting the two oldest boys, pouring hot pepper in their mouths as a form of punishment, and continuously screaming at the three oldest children." *Id.* Although Etty was released from hospital a month later, she alleged that Eluzer refused to allow the four youngest children to return home, claiming that Etty was not ready. *Id.* at 14.

117. *Id.* at 16–17. Three days after this, Eluzer moved to remove the three eldest children from their mother, requesting that he have custody over them, or to have them placed with separate family members. *Id.* at 17. Notably, the motion was filed on a day when Judge Prus received the case as the assigned emergency judge. *Id*. This is significant because Judge Prus presided over another case with similar facts to this one (a child custody dispute with an allegedly homosexual mother lapsing in religious practice) around the same time. *Id.* In that case, Judge Prus allowed counsel for the Father to cross-examine Etty—a witness in the case—about her relationship with that mother. *Id.* at 18. There, "the Trial Court had previously made negative credibility determinations . . . and awarded custody to the ultra-Orthodox father." *Id.* Moreover, Etty alleges that the Judge permitted Counsel to "exploit the Court's intimate knowledge of that case and argue guilt by association against [Etty]." *Id.* Thus, when Etty appeared in front of Judge Prus for her own case, her credibility may have been negatively pre-determined. *See id*. Moreover, in New York, "[c]ustody determinations depend to a great extent upon the court's assessment of the credibility of the witnesses, as well as the parties' character, temperament, and sincerity." Gribeluk v. Gribeluk, 991 N.Y.S.2d 117, 118 (App. Div. 2014). Since Etty had been impeached in front of the judge before her own case had begun, it can be argued that her custody case was an upstream battle. Brief for Appellant at 17–18, *Ausch*, 67 N.Y.S.3d 489 (No. 2016-09081).

118. *Id*. at 22. Dr. Raff went on to state that it "was best for the Children to remain in the care of

from Etty, and placing each with a different caretaker indefinitely.[119]

In appellant's brief, Etty argued that the trial court's removal of the children was unjustified under Article 10 of the Family Court Act, which requires a showing of neglect or abuse by the mother.[120] Etty argued that none of the factors for the "best interest of the child" analysis—individually or collectively—demonstrated that it was in the children's best interest to be removed from their mother.[121] The Appellate Division of the New York Supreme Court, however, upheld the trial court's decision in denying her motion.[122]

2. *Aldous v. Aldous* (1984)

In *Aldous v. Aldous*, the Appellate Division of the New York Supreme Court held that the lower court had violated the Establishment Clause by impermissibly deciding on matters of religion in a child custody dispute.[123] Plaintiff, Catherine Aldous, and defendant, Philip Aldous, married in 1971

[the] Mother, and with each other," *id.* at 25, and "that the emotional bond between [Etty] and the three eldest children was the bedrock for their sense of stability and that they must remain in her care together for their mental and emotional well-being," *id.* at 24. Nonetheless, the court conducted a one hour in-camera hearing on June 30, 2016, during which the children displayed acts of aggression toward their father, such as spitting at him and stating "[t]his is all your fault." Brief for Respondent at 20–21, *Ausch*, 67 N.Y.S.3d 489 (No. 2016-09081). In response to this, the court believed it would be in the best interest of the children to be away from their parents and "take a 'time out'" for the summer, and so issued an order memorializing this decision on June 30, 2016. *Id.* at 25.

119. *Id.* at 31–32. In the Respondent's brief, Eluzer argued that the Court's decision to remove the children should be upheld, asserting that the removal was indeed in the children's best interest. *Id.* at 29. Eluzer argued that at the trial level, Judge Prus correctly followed precedent by directing the children to temporarily remain in the custody of other family members. *Id.* Eluzer argued that Etty had alienated the children from her family, from him, and from the community. *Id.* at 30. Without using the word "religion," Eluzer described Etty's "newfound beliefs" as imposing on the children without contemplating the harm it would cause them. *Id.* Finally, Eluzer cited Dr. Raff's testimony in arguing that it was in the children's best interest to remain in the Hasidic community to continue the lifestyle they had hereto forth been exposed to. *Id.* at 30–31.

120. Brief for Appellant at 31, *Ausch*, 67 N.Y.S.3d 489 (No. 2016-09081).

121. *Id.* at 33. Etty further argued that even if there was an actual risk of harm, such a risk must be balanced against the potential harm removal might bring. *Id.* at 34. Moreover, she stated, evidence must be presented to demonstrate that efforts were made to prevent removal where necessary. *Id.* Etty argued that no efforts were made to prevent the removal of the children from their primary caretaker. *Id.* Finally, Etty moved to vacate the judgment ordering removal of the children from her custody, which was subsequently denied. *Ausch*, 67 N.Y.S.3d at 489.

122. *Ausch*, 67 N.Y.S.3d at 489.

123. 473 N.Y.S.2d 60, 62–63 (App. Div. 1984).

and divorced a decade later.[124] Together, the couple had two children, Kimberly and Jennifer.[125] At the close of the initial child custody hearing, the court awarded permanent custody to Catherine, with visitation rights to Philip.[126] In issuing its decision, the court stated, "[t]he lifestyle that [Philip] has chosen revolving himself around his church is not what the children want or need at this stage."[127] Ultimately, the court concluded that it was in the best interest of the children to stay with their mother.[128]

On appeal, Phillip argued that the family court had entangled matters of church and state by inquiring into the religious tenets of a custodial parent.[129] On review, the court reiterated precedential authority holdings that religion may be considered as a factor in the overarching "best interest of the child" analysis, though it "may not be the determinative factor."[130] The appellate court found that the lower court's determination to award the mother custody based on a finding that Phillip's religious views were too discipline-orientated was constitutionally impermissible.[131] Nonetheless, the court affirmed the decision to keep the children in the custody of their mother on other grounds that were buttressed by the children's "best interest" analysis.[132] Thus, the court concluded that while the court's endorsement of religious considerations overstepped constitutional boundaries, its analysis of other factors negated the contention that religion "tainted the final determination of custody or caused an abuse of discretion by the court," as others factors strongly and sufficiently supported the finding that it was in the children's best interest to remain with their mother.[133]

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124. *Id.* at 61.

125. *Id.*

126. *Id.* at 62.

127. *Id.* The court further stated that "[i]f [the father] were to be awarded custody, [the children's] entire lifestyle would have to change to suit him and his new beliefs." *Id.*

128. *Id.* To support its finding, the court stated that the children's father was "more interested in forcing the children to conform to his beliefs than in what [was] best for the children." *Id.* The court also noted that the main cause of the dissolution of the marriage was the difference in religious beliefs of both parties, and, "in particular, the requirements necessary to fulfill the principles and practices of the church to which [Phillip] is affiliated." *Id.*

129. *Id.* Phillip argued that this entanglement was in direct violation of the Free Exercise Clause and the Establishment Clause of the First Amendment. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 62–63.

133. *Id.* at 63. In other precedential cases, courts considered but ultimately did not uphold alleged

E. The Free Exercise Clause in Child Custody Disputes

In *S.E.L. v. J.W.W.*, the New York County Supreme Court decided the question of how to reconcile the right of a custodial parent to direct the religious upbringing of their child, with the right of the non-custodial parent to freely exercise religion during periods of visitation.[134] Soraya Esteban Lebovich (S.E.L.) and James Wilson (J.W.) divorced in 1987, resulting in custody of their child, Natalie, remaining with S.E.L.[135] J.W. was a Jehovah's Witness practicing "religious services, activities, and teachings."[136]

In reviewing J.W.'s visitation rights, the court grappled with the level of restrictions, if any, that should be placed on Natalie's exposure to his religion.[137] The court reasoned that, "[t]he right to free exercise of religion guarantees that a court will not make . . . a custody decision, based on its view of the respective merits of two religions," and, "a non-custodial parent's right to practice his or her religion will not be abrogated when the child visits except to the extent necessary to prevent any harm to the child."[138]

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oral upbringing agreements. Stevenot v. Stevenot, 520 N.Y.S.2d 197, 198 (App. Div. 1987). In *Stevenot*, the Appellate Division of the New York Supreme Court held that absent a specified agreement as to the children's religious upbringing, the authority to dictate their religious training vests in the custodial parent. *Id.* Plaintiff wife appealed a decision from the lower court, granting defendant husband's motion ordering her to raise their two children in accordance with the faith of the Congregational Church. *Id.* The dispute centered around an alleged oral contract made before the marital relationship, and then repeated during it. *Id.* The agreement, however, was not memorialized in the judgement of divorce, nor was it evidenced in any other writing. *Id.* The court stated that an oral agreement that had not been reduced to writing would not be binding following the dissolution of the marriage if the terms had not been included in a settlement or divorce judgment. *Id.* Finally, the court stated that without a contract, the custodial parent was the appropriate arbiter of the children's religious upbringing. *Id.*

134. S.E.L. v. J.W.W., 541 N.Y.S.2d 675, 676 (Fam. Ct. 1989). Although not an appellate division case, the *S.E.L* decision is generally in line with Free Exercise Clause jurisprudence and can therefore be used as persuasive authority in this analysis. *See* U.S. CONST. amend. I.

135. *S.E.L.*, 541 N.Y.S.2d at 676.

136. *Id.*

137. *Id.* To determine this, the court looked to Free Exercise jurisprudence in its analysis, stating that "[a] Court Order Which Adversely Impacts A Non-Custodial Parent's Free Exercise Of His Or Her Religion Would Be An Unconstitutional Infringement of First Amendment Rights When Based On An Assessment Of The Merits Of His or Her Religion." *Id.* at 677 (capitalization in original).

138. *Id.* In delineating between consideration of religion against other child custody factors, the court cited relevant authorities that upheld the determination that, although religion is a permissible factor for consideration in child custody cases, it may not be the determinative factor. *Id.*; *see* Aldous v. Aldous, 473 N.Y.S.2d 60, 62 (App. Div. 1984). Instead, the court reasoned, religion is to be considered when the child has adopted a particular religion, and its observance is better facilitated by one parent than another. *S.E.L.*, 541 N.Y.S.2d at 677.

The court parsed through relevant precedent and determined that where a divorce settlement agreement existed pertaining to the religious upbringing of a child, the burden of preventing its enforcement fell on the party wishing to "modify or avoid" it.[139] The court concluded that, because J.W. had agreed in a stipulation of settlement "that S.E.L would have absolute custody and exclusive supervision, control and care" of their daughter Natalie, the burden fell on him to prove that denying Natalie exposure to Jehovah's Witness practices would not be in her best interests.[140] In other words—that exposure to his religion would not be harmful to their child.[141]

The next step of the court's analysis was to consider whether J.W. had waived his Free Exercise right by agreeing to the separation document.[142] In its analysis, the court stated that although it was sensitive to J.W.'s First Amendment claim, "the situation is further complicated because rights of Constitutional dimension can be freely waived."[143] The court reasoned that when J.W. agreed to bestowing "exclusive supervision, control and care" to S.E.L., he had effectively forfeited his free exercise right of practicing his religion during visitation periods.[144] Finally, the court concluded that because J.W. had contracted away his First Amendment rights, and because he failed to demonstrate that exposure to his religion would not be harmful to the child, J.W. would only be allowed to include Natalie in his Jehovah's Witness services on Sunday without any further involvement.[145]

139. *S.E.L.*, 541 N.Y.S.2d at 679. The court reached these conclusions by comparing *Gruber v. Gruber*, 451 N.Y.S.2d 117, 118 (App. Div. 1982) and *Spring v. Glawon*, 454 N.Y.S.2d 140, 141 (App. Div. 1982), both dealing with separation agreements and their enforceability as it pertains to the upbringing of the child, with *Bentley v. Bentley*, 448 N.Y.S.2d 559, 559–60 (App. Div. 1982), where no such agreement existed. *S.E.L.*, 541 N.Y.S.2d at 679.

140. *S.E.L.*, 541 N.Y.S.2d at 677.

141. *Id.*

142. *Id.* The court stated that such a right requires that the merits of each parent's religion are *not* evaluated in rendering the custody decision. *Id.* at 680. Further, the court stated that the Free Exercise Clause "guarantees that no limitation will be placed on a non-custodial parent's right to practice his or her religion when the child visits except to the extent necessary to prevent any harm to the child." *Id.*

143. *Id.* at 679. *See supra* Section II.B (discussing waiver of Free Exercise rights).

144. *S.E.L.*, 541 N.Y.S.2d at 679.

145. *Id.* Nonetheless, the court found that while Free Exercise rights may be contractually waived, such a waiver does not vest absolute religious decision-making authority to the other parent. *See id.* While S.E.L had the legal right to determine Natalie's religion, that right did not authorize her to prohibit absolute exposure J.W.'s faith. *Id.* at 680.

IV. ANALYSIS

A. To What Extent May Courts Consider Religion in Child Custody Disputes?

The first point of inquiry involves determining how much latitude courts have to consider religion in child custody disputes.[146] While courts look to a number of factors in determining the best interest of the child, a judicial fluster has historically occurred when determining the extent to which religion may be factored into its analysis.[147] In an attempt to smuggle religion into the "best interest" analysis, a number of courts have historically considered a parent's religious practices as linking directly to the child's temporal wellbeing.[148] Other courts have made no such attempt to merge religion with the "best interest" factorial analysis, instead simply weighing the merits of one religion against the other.[149] Nonetheless, it has become clear that whatever guise re-

146. *See supra* Section III.C. The central cases for the purposes of this discussion, as mentioned in Part III, are Ausch v. Ausch, 67 N.Y.S.3d 489 (App. Div. 2018); Aldous v. Aldous, 473 N.Y.S.2d 60, 63 (App. Div. 1984); and Stevenot v. Stevenot, 520 N.Y.S.2d 197, 198 (App. Div. 1987). Since the Establishment Clause is a subsect of the First Amendment, this constitutional protection extends to all states, and thus, the lens need not be narrowed to examine the governing New York standard alone. *See* U.S. CONST. amend. I. Nonetheless, states may individually possess statutes that provide judicial guidelines for how the best interest of the child is to be evaluated. *See* MICH. L. REV. ASS'N, *supra* note 38, at 1702. The statutorily prescribed factors to be considered in New York are listed in Section III.A. ((1) "[T]he quality of the home environment"; (2) the parental guidance provided by the custodial parent; (3) each parent's ability "to provide for the child[ren]'s emotional and intellectual development"; (4) each parent's financial status, including their respective abilities to provide for the children; (5) each parent's relative fitness; and (6) the effect a grant of custody to one parent would have on the "child[ren]'s relationship with the other parent."); *see also* cases cited *supra* note 93.

147. *See* George L. Blum, Annotation, *Religion as Factor in Child Custody Cases*, 124 A.L.R. 5th 203, 203 (2004).

148. *See, e.g.*, Blackley v. Blackley, 204 S.E.2d 678, 681 (N.C. 1974) (explaining that the trial court considered the mother's religiousness in order to determine whether the home environment would encourage the development of the child's mental, physical, spiritual, and moral faculties). One study contemplating the link between religion and emotional wellbeing proved inconclusive. *See* 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, 407 (1989) (finding "marginal support for a positive effect of religion"). Historically, courts have used three different approaches to considering religion in child custody disputes: (1) religion as advancing the best interest of the child; (2) religion as threatening the child's well-being; and (3) flatly preferring one religion over another. Jennifer Benning, *A Guide for Lower Courts in Factoring Religion into Child Custody Disputes*, 45 DRAKE L. REV. 733, 742–45 (1997).

149. *See, e.g.*, Reaves v. Reaves, 399 So. 2d 311, 312–13 (Ala. Civ. App. 1981).

ligious preference takes, it risks running afoul of the *Lemon* Test if misguidedly applied.[150]

1. Religion as Merging in the "Best Interest" Analysis

The first subset of this issue asks whether merging religion into the "best interest" analysis is permissible.[151] At first blush, this would appear to be a constitutionally viable determination.[152] For example, considering the religious beliefs of the child himself and contemplating how those beliefs can further the child's welfare seems perfectly in line with First Amendment jurisprudence.[153] Additionally, courts have jurisdiction to consider religion as a non-determinative factor in its custodial analysis.[154] The danger arises, however, when courts go beyond this narrow constitutional sidestep and instead regard religion as positively impacting the quality of the home environment, thereby casting a proscribed credibility determination on religion.[155]

In *Aldous*, the appellate court found that the family court had impermissibly "entangled matters of church and state" when it held that the children's lives would be negatively impacted by the father's commitment to the church and awarded the mother full custody.[156] The lower court had cast a credibility determination upon the father's faith, resulting in a violation of the *Lemon* test by having the principal effect of inhibiting religion.[157] The appellate court in *Aldous* forgave this constitutional lapse because, on proper consideration of the factors, they nevertheless weighed in favour of keeping the children with

150. *See* MICH. L. REV. ASS'N, *supra* note 38, at 1708; *supra* Section II.A.1.

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

152. *See* Beschle, *supra* note 148, at 417.

153. *Id.* If the child himself states that he prefers one religion over another, placing him in the care of the custodian who is best able to nurture his faith does not offend the First Amendment, since the court is responding to the *child's* preference, rather than its *own* preference. *Id.*; U.S. CONST. amend. I.

154. *See supra* notes 52, 138 and accompanying text.

155. *See* Beschle, *supra* note 148, at 417. Under the Establishment Clause, the government has no standing to make credibility determinations about religion. U.S. CONST. amend. I. Equally dangerous, still, is the converse premise that the presence of religion diminishes the home environment. *See* Aldous v. Aldous, 473 N.Y.S.2d 60, 62–63 (App. Div. 1984).

156. *Aldous*, 473 N.Y.S.2d at 62–63.

157. *Id.*; Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971). When the court makes a positive credibility determination about a particular religion, on the other hand, it has the proscribed effect of advancing religion. *Id.*

their mother.[158] Because the appellate court is tasked with equitably considering the *best interest of the child* factors, and because those factors consummately proved the mother to be the appropriate custodian, the court correctly decided *Aldous*.[159] Nonetheless, *Aldous* represents a long line of New York cases where appellate courts are forced to clean up lower courts' sloppy constitutional blunders.[160]

In *Ausch*, Eluzer argued that Etty's secularism would prove harmful to the children, and it would therefore be in the children's best interest to remain within the Hasidic community.[161] While the *Ausch* case is still ongoing, a review of Establishment Clause jurisprudence reveals that these contentions would violate the *Lemon* test—absent an actual showing of harm—by lending judicial credence to Orthodoxy and allowing its heightened credibility to swing the custodial vote.[162]

On review, the distinction between permissible and impermissible uses of religion in "best interest" analyses seems to lie in the theory of religious agency.[163] If a child professes belief in a particular religion, and the court

158. *See Aldous*, 473 N.Y.S.2d at 63 ("In sum, there is an abundance of evidence in this record to support the determination of custody as made, and although the court's consideration of religion may be impermissible in this case, its analysis of the other factors, fully supported in the record, negates any implication that religion, as an issue, tainted the final determination of custody or caused an abuse of discretion by the court.").

159. *Id.* at 62–63. The court discusses "other grounds" that support keeping the children with their mother, such as the fact that the children had been with their mother since birth, there was "evidence of the degradation of plaintiff [mother] by defendant [father] and his parents when the children were with him," and "evidence of plaintiff's stable family life which permits her to care for the children all day on a daily basis." *Id.*

160. *See supra* Section III.C–D. In the cases discussed in this Note, the appellate courts are frequently correcting the lower New York courts' misguided application of the "best interest" analysis—impermissibly stepping on the First Amendments toes by making credibility determinations about religion, thereby regarding religion as positively impacting the child's wellbeing. *See supra* Section III.C–D.

161. Brief for Respondent at 30–31, Ausch v. Ausch, 67 N.Y.S.3d 489 (App. Div. 2018) (No. 2016-09081).

162. *See Lemon*, 403 U.S. at 612–14. This would have the principal effect of advancing Hasidism. *Id.* A review of Establishment Clause jurisprudence reveals that the government cannot overstep its bounds by giving undue weight to religion in child custody disputes. *See* U.S. CONST. amend. I. A review of precedential New York cases depicts a pattern of lower court decisions being overturned for impermissible deference to religion. *See supra* Section III.C–D. Moreover, *Lemon* defines the relevant law—that the government violates the establishment clause where a law has no "secular legislative purpose," but instead advances or inhibits religion. 403 U.S. at 612. For that reason, analysis of *Ausch* is preordained with the presumption that inequitable consideration of religion will result in constitutional oversight. *Cf.* 67 N.Y.S.3d at 489.

163. *See* Beschle, *supra* note 148, at 399, 417.

finds that her faith is intimately intertwined with her development, the First Amendment is not offended by a determination that continued religious practice is in the best interest of the child.[164] This is because, in effect rather than in application, the state is divested of its power of partisanship by simply advancing the wishes of the child—whether or not they pertain to religion or secularism.[165] In *Ausch*, however, the children expressed a preference for remaining with their mother, an endorsement that could not be objectively tied to a demand for stringent religious development in the custody of an alien caregiver.[166]

In sum, courts avoid stepping on the First Amendment's toes when spotlighting religion in the "best interest" analysis only when responding to the child's self-professed religious demands.[167] Otherwise, where religion creeps into custodial determinations under the guise of the child's best interest, but the court determines on its own accord that the presence of religion would either advance or inhibit the quality of the family environment, the second prong of the *Lemon* test is implicated, resulting in a violation of the Establishment Clause.[168] Therefore, religion may be considered a paramount factor if it comports with the child's preference, but it may not be the determinative factor if it comports solely with the state's preference.[169]

164. *See id.*

165. *See id.* Instead of the court having an opportunity to prefer a religion, the child chooses the religion and the court memorializes this choice in its custodial order. *Id.* at 399.

166. Brief for Appellant at 9–10, *Ausch*, 67 N.Y.S.3d at 489 (No. 2016-09081) ("[T]he Children's expressed wishes are to remain with each other and with their Mother . . . . The children have also strongly expressed to their Mother, the expert forensic psychiatrist, and the caseworkers who conducted the Court Ordered Investigation ("COI") that they wish to live with her. The expert forensic psychiatrist also opined that the three eldest children have a strong bond to their Mother and to each other, and should remain together. The Trial Court erred in removing the three Children from their Mother and placing them with three separate caregivers.").

167. *See* Beschle, *supra* note 148, at 417 ("Seeking to determine and further the religious beliefs of a mature child can both further the child's welfare, particularly the child's need for stability, and protect a mature child's emerging free exercise rights.").

168. *See id.* at 391–92, 417; Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971). The Supreme Court in *Lemon* determined the governments appropriate latitude in religious disputes. *See id.* Under this standard, if a court makes credibility determinations about a particular religion in determining the best interest of the child, a constitutional violation occurs. *See id.* For example, when choosing between a Christian mother and a Jewish father, if the court deems the Christian faith as fostering a more hospitable home environment for the child, the decision to award custody to the mother offends the First Amendment by entangling matters of church and state. *See* Beschle, *supra* note 148, at 420–21.

169. *See* Lemon v. Kurtzman, 403 U.S. at 612–13; Beschle, *supra* note 148, at 417.

2. Weighing the Merits of Religion

The next point of inquiry is whether courts may weigh the merits of one religion against another.[170] This issue arises most often in child custody disputes where both parents wish to provide the child with a religious upbringing, but each parent practices a different religion.[171] Discussion of the Establishment Clause hitherto should make it relatively clear that courts have no jurisdiction to prefer one religion over another.[172] This type of improvident assessment is known as "denominational preference."[173] The rule against denominational preference is best evidenced in *Larson*, holding that the government may not prefer one religion over another unless, under strict scrutiny, such a preference is tied to a compelling state interest.[174] The promise of *Larson*, however, has left a lot to be desired, and in application has proven both dubious and inconsistent.[175]

Despite the ambiguity of *Larson*, the unconstitutionality of weighing the merits of one religion against another has uncontestedly proven to be the bedrock of the Establishment Clause.[176] Further, even if *Larsons's* strict scrutiny

170. On its face, this appears to be quite literally the evil that the Establishment Clause seeks to avoid. *See* U.S. CONST. amend. I.

171. *See* Beschle, *supra* note 148, at 400. Such cases are becoming ever more prevalent as the rate of interreligious marriage and divorce increase exponentially. *Id.* These cases usually call for the merits of one religion to be weighed against the other in determining which avenue comports with the best interest of the child. *Id.*

172. *See* U.S. CONST. amend. I.; *Lemon*, 403 U.S. at 612–13; Beschle, *supra* note 148, at 400.

173. *See* Patrick-Justice, *supra* note 76, at 54–55. The rule against denominational preference is grounded in "strong historical roots" and is (almost) unanimously considered to be one of "the most fundamental guarantees of religious freedom." *Id.* Even the most conservative members of the Supreme Court, Justices Rehnquist and Scalia—who have long criticized the notion of separation of church and state—agree that denominational preference is constitutionally proscribed. *Id.* at 55. Despite the fluctuation among the courts regarding religion in the law, this is one area that most unanimously agree. *Id.*

174. *See* Larson v. Velente, 456 U.S. 228, 246 (1982); *supra* Section III.B. To recap, the *Larson* court concluded that the Establishment Clause prohibited the preference of one denomination over another, except in the rare cases in which denominational biases were justified by a "close[] fit[]" to a compelling state interest. 456 U.S. 228 at 247. The identification of this compelling state interest in child custody disputes is discussed in the remaining body of this analysis. *See infra* Section IV.A.2.

175. *See* Patrick-Justice, *supra* note 76, at 55–56 ("[L]ower courts apply [the strict scrutiny test] in an inconsistent manner, and the meaning and correct application of the case [is] still unclear over twenty years after it was decided. . . . Further, the case is not included in most casebooks on religious freedom or general constitutional law and is therefore not well known to most emerging legal scholars.").

176. *See id.* at 55; *Larson*, 456 U.S. at 244; Beschle, *supra* note 148, at 400; *see also* U.S. CONST. amend. I.

test was to consummately materialize in a string of twenty-first century cases, courts would be hard-pressed to deem the religious preference of one custodial parent over another as a "close[] fit[]" to a compelling government interest.[177] The only exception to this—and where *Larson* finds its force—is in cases where a particular religion poses a clear and imminent threat to the child's well-being.[178] In such a case, the compelling interest that gives constitutional credence to judicial intervention in private religious affairs is the state's interest in protecting the child from harm.[179] Such cases, however, are rare, and typically involve one parent's conversion to an extremist sect, endangering the welfare of the child.[180]

Larson's non-interference-absent-harm standard frames the constitutional standard for considering religion in child custody cases.[181] Thus, the First Amendment means courts can rarely—if ever—weigh the merits of one religion against another in making child custody determinations.[182] The exception to this rule, as provided by *Larson*, is when a danger to the child's

177. Matters of the religion in the home very rarely justify intrusion by the state for any compelling interest, absent a showing of harm to the child. *See* Beschle, *supra* note 148, at 400–01; *Larson*, 456 U.S. at 247.

178. *See* Beschle, *supra* note 148, at 400–01.

179. *Id.*

180. *Id.* at 401; *see, e.g.*, Burnham v. Burnham, 304 N.W.2d 58, 60 (Neb. 1981). There, the Supreme Court of Nebraska found that a mother's involvement in an ultra-conservative sect created an impending danger for the welfare of her child. *Id.* at 60–62. The mother—the defendant in that case—believed that because her marriage was illegitimate, her daughter was therefore also illegitimate, and proved willing to cut her daughter out of her life were she not to obey the rules of the church. *Id.* at 60–61. The court reasoned that because the child's welfare was endangered by the defendant's religious affiliation, it would be in the child's best interest to place her in the permanent custody of her father. *Id.* at 62. *Burnham* is an example of the minority cases in which a compelling state interest—the well-being of the child—overrides the governments neutrality requirement under the Establishment Clause. *See id.*; *see* U.S. CONST. amend. I. Even though *Burnham* never explicitly mentioned *Larson* or the *strict scrutiny* test, even a cursory reading of the case illustrates that the compelling governmental interest of protecting the child from her ultra-conservative parent licensed the court to prefer one parent over the other on religious grounds in determining the best interest of the child. *See Burnham*, 304 N.W.2d at 61 (showing that during questioning, defendant was asked "if [your daughter] disobey[ed] the rules of the Church, [would you be] willing to cut her off from your life?" To which she responded, "[i]f she disobeys the laws of the Church, I would" and, "[t]he laws of the Church are the laws of the Church").

181. *See Larson*, 456 U.S. at 244–46. Under *Larson*, the government is not permitted to prefer one denomination over another unless the child's welfare is in danger, in which case, the court *would* be permitted to prefer the alternative parent's religion by virtue of a compelling state interest—protecting the child from harm. *See id.*

182. *See* Beschle, *supra* note 148, at 400–01.

welfare justifies judicial intervention by a compelling state interest in maintaining the child's wellbeing.[183] In such a case, the court has standing to prefer one religion (or secularism) over another, by virtue of the injurious environment fostered by the other custodian's religious beliefs.[184]

B. How Do Religious Upbringing Clauses Alter the Court's Analysis?

The *pièce de résistance* of this discussion calls for an examination of how religious upbringing agreements alter the framework of the court's analysis.[185] Fundamentally, the Establishment Clause does not, on its face, serve as a restriction on judicial consideration of religious upbringing clauses in child custody cases.[186] That is, the agreement does not per se entangle matters of church and state, because the court is not creating a religious identity for the child, but rather, enforcing an identity that was contractually agreed upon by the parents.[187] However, constitutional issues pertaining to these agreements manifest when lower courts misapply the law.[188] A cursory analysis of historical New York cases depicts a constitutionally viable avenue for enforcing religious upbringing clauses.[189]

In *Spring*, the court enforced the parties' religious upbringing agreement in ordering the mother to withdraw her son from a Catholic school.[190] The court reinforced its position as one of non-interference and asserted that it could not be compelled to intervene absent a showing of harm to the child.[191]

183. *See Larson*, 456 U.S. at 247. In such instances, the danger to the child forces the court's hand to determine the better custodial parent by virtue of their respective religious practices. *See* Beschle, *supra* note 148, at 400–01.

184. *See, e.g.*, *Burnham*, 304 N.W.2d at 61–62.

185. *See infra* Section IV.B (fleshing out how courts resolve custody disputes when a religious upbringing clause is present). The *pièce de résistance* refers to "the best and most important or exciting thing, often the last in a series of things." CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/piece-de-resistance (last visited Mar. 9, 2019).

186. *See* Martin Weiss & Robert Abramoff, *The Enforceability of Religious Upbringing Agreements*, 25 J. MARSHALL L. REV. 655, 660 (1992).

187. *See id.* at 660.

188. *See id.* at 660–61.

189. *See* Spring v. Glawon, 454 N.Y.S.2d 140, 141 (App. Div. 1982); Gruber v. Gruber, 451 N.Y.S.2d 117, 118 (App. Div. 1982).

190. 454 N.Y.S.2d at 142. The provision stated that the child shall have no religious upbringing absent the express consent of both parents. *Id.* at 141. Thus, enrolling her son in a Catholic school violated the contract's provisions. *Id.*

191. *Id.* at 142.

Looking at *Spring*, a viable angle for enforcing a religious upbringing agreement is through neutral application of contract law, unless and until the party opposing its enforcement can demonstrate that such application would not be in the best interest of the child.[192] This theory comports with Establishment Clause jurisprudence by blending neutral principles of law with the *Larson* strict scrutiny test.[193] The court neutrally enforced the upbringing clause without subjectively weighing one religion against the other (or here, Catholicism against secularism), and took the position of non-interference absent a compelling state interest that justified disturbing the agreement.[194]

On one hand, *Spring* stands for the high bar of private contract rights in child custody cases.[195] That is, in cases where a religious upbringing clause exists in a settlement agreement, courts are inclined to leave the document undisturbed unless the party seeking to avoid its enforcement is able to demonstrate that it is not in the best interest of the child to do so.[196] In *Spring*, even though St. Joseph's was a demonstratively good school—seemingly better than local schools in the area—and only one block from his mother's home, the court ruled in favor of immediately removing Evan from the school and enrolling him in a secular school in order to comply with the contract.[197] On the other hand, *Spring* poaches *Larson*'s strict scrutiny standard by giving it constitutional force in the presence of religious upbringing agreements.[198] This consolidated standard therefore states that unless harm to the child justifies state interference under *Larson*, neutral principles of law must govern the contract's enforcement under *Spring*, without reference to any particular religion.[199]

192. *Id.* Because the defendant-mother failed to demonstrate how enforcement of the agreement would negatively impact the child, the court was constitutionally justified in upholding the religious upbringing document. *Id.* at 142.

193. *See supra* Sections III.A, IV.A.

194. *See Spring*, 454 N.Y.S.2d at 142.

195. *See id.*

196. *See id.* Said simpler, the agreement will be modified or avoided only if the party moving to avoid it can prove that its enforcement would harm the child. *See id.*

197. *Id.*

198. *See id.*; *Larson*, 456 U.S. at 244–46. *Larson*'s standard, as applied, denies judicial evisceration of private custody contracts without a justifiable state interest. *See Larson*, 456 U.S. at 247–48; *Spring*, 454 N.Y.S.2d at 142. We have seen this standard set forth in denominational preference cases—that is, the court may not prefer one religion over another unless harm to the child warrants making such a credibility determination—however, *Spring* represents the first case in this Note where *Larson* extends over to cases with religious upbringing clauses. *See* discussions *supra* Section IV.B.II.

199. *See Spring*, 454 N.Y.S.2d at 142. Incidentally, that same year, the New York Appellate Court

Thirty-five years later, this legal standard was aptly memorialized in *Weisberger*.[200] In that case, the appellate court found that because the lower court had leaned on the mother's transition toward a "more progressive . . . secular world" as a determining factor in removing the children, it implicated the *Lemon* test in having the proscribed effect of advancing (the Hasidic) religion.[201] The court's holding does not appear to abrogate the force of the religious upbringing clause altogether—indeed, the clause was modified rather than expunged—however, the order was modified because the trial Judge went beyond the First Amendment's parameters by deeming a religious environment as better serving the interests of the children.[202] Thus, the trial court failed to apply *Spring*'s neutral principles of law in enforcing the contract, and state interference was not justified by *Larson's* strict scrutiny test, because although the children's best interest was paramount in determining the issue of custody there was no showing that the mother's lifestyle was in anyway harmful to the children.[203] Therefore, the court failed the *Lemon* test

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reached the same conclusion in Gruber v. Gruber, 451 N.Y.S.2d 117, 122 (App. Div. 1982). There, the Court stated that "no reason appears why the provisions of the contract should be ignored." *Id.* In that case, the parties' religious upbringing agreement provided that "the CHILDREN shall attend a [Jewish school] providing Jewish religious training until the completion of the 12th grade." *Id.* at 118. On review, the Appellate Court found that "[t]he evidence in the record fail[ed] to support the notion that a [Jewish School] education, per se, [would] be detrimental to these children." *Id.* at 122. Without a compelling state interest to justify interference, the court was bound by the terms of the agreement. *See* Larson, 456 U.S. at 247.

200. Weisberger v. Weisberger, 60 N.Y.S.3d 265, 273 (App. Div. 2017).

201. *Id.* at 272–73.

202. *Id.* at 273. In doing so, the trial court missed the mark of the constitutional footsteps set forth by *Spring* and *Gruber* in their neutral application of contract law. *See* discussion *supra* Section IV.B.I. The only standing the court had to avoid the antenuptial contact, which placed the children in their mother's possession, was a showing that the children would be harmed by enforcing the contract and remaining with their mother. *See supra* Section IV.I. No such finding was evidenced on the record. *Weisberger*, 60 N.Y.S.3d at 275 ("There is no indication or allegation that the mother's feelings and beliefs are not sincerely held, or that they were adopted for the purpose of subverting the religious upbringing clause, and there has been no showing that they are inherently harmful to the children's well-being."). Additionally, the court may have had jurisdiction to consider religion as a paramount factor if indeed the children professed to preferring such an environment, and the mother was unable or unwilling to accommodate this demand. *See supra* Section IV.I. Once again, no such finding was evidenced on the record. *See Weisberger*, 60 N.Y.S.3d at 275.

203. *See supra* Section III.B.I. The only reason the religious upbringing clause in *Weisberger* was ultimately pulled apart was because both parties had authorized the court to disturb the agreement in conceding that a change in the circumstances warranted modification. *Weisberger*, 60 N.Y.S.3d at 273. The father in that case failed to demonstrate that awarding him full custody was in the children's best interest, and in fact, overwhelming evidence showed it would actually be harmful to remove the

by preferring the father's Hasidism over the mother's "progressive" lifestyle, and using this as justification for gutting the agreement and repealing the mother's residential custody rights.[204]

On reviewing the differences between child custody disputes with and without a religious upbringing clause over time, the same standard seems to apply inversely.[205] When no agreement is present, courts may equitably consider religion in its multi-factored analysis but it may not prefer one religion over another, unless a compelling state interest justifies such a credibility assessment.[206] On the other hand, when an antenuptial agreement delineates the preferred religious identity of the child, the contract is enforced unless a compelling state interest justifies disturbing the agreement.[207]

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children from the mother. *Id.* at 274. For that reason, the religious upbringing clause had to be modified because its enforcement would result in harm to the children. *Id.*

204. *See id.*; Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971); discussions *supra* Section III.A. The trial court erred not in considering the religious upbringing clause *at all*, but in considering it too much. *See Weisberger*, 60 N.Y.S.3d at 274 ("In pertinent part, the court gave undue weight to the parties' religious upbringing clause, finding it to be a 'paramount factor' in its custody determination. 'When presented as an issue, religion may be considered as one of the factors in determining the best interest of a child, although it alone may not be the determinative factor.'" (quoting Aldous v. Aldous, 473 N.Y.S.2d 60, 62 (App. Div. 1984))). *Weisberger* demonstrates that the current legal standard is still reminiscent of *Spring's* neutral-application-absent-harm standard, where *Larson*'s compelling state interest finds its force as the only means to survive strict scrutiny of state interference in religious upbringing disputes. *See id.*; *Spring*, 454 N.Y.S.2d at 141; *Gruber*, 451 N.Y.S.2d at 118.

205. *Compare Aldous*, 473 N.Y.S.2d at 63 (where no religious upbringing clause existed), *with Weisberger*, 60 N.Y.S.3d at 272 (where a religious upbringing clause existed); *see* discussion *supra* Part IV.

206. *See Aldous*, 473 N.Y.S.2d at 63. A clear-cut case where such a determination was viable was in *Burnham*, where the court found that a mother's involvement in an ultra-conservative sect created an impending danger for the welfare of her child after she explicitly stated that "[i]f [my daughter] disobeys the laws of the Church, I would [cut her off]." Burnham v. Burnham, 304 N.W.2d 58, 61 (Neb. 1981).

207. *See Weisberger*, 60 N.Y.S.3d at 275. An additional difference in incorporating religious upbringing clauses to child custody disputes as it relates to the Establishment Clause is that without the agreement, religion may be considered, and with the agreement, it must be considered. *Compare Aldous*, 473 N.Y.S.2d at 63 (where no religious upbringing agreement existed), *with Weisberger*, 60 N.Y.S.3d at 272 (where a religious upbringing clause existed). Because contract law governs the enforcement of religious upbringing agreements, the danger of running afoul of the constitution presents a heightened challenge. *See* Weiss & Abramoff, *supra* note 186, at 656–57. The courts must therefore contemplate how to employ contract law without violating the First Amendment. *See id.* Nonetheless, this challenge is neatly sidestepped by applying neutral principles of law in the "best interest of the child" analysis—that is, as per *Larson*, objectively enforcing the contract unless there is a compelling state interest that demands its rescission or modification, which typically manifests only in the rare circumstances where one parent's religion is in danger of harming the child. *See* Larson v. Valente, 456 U.S. 228, 247–48 (1982); *Burnham*, 304 N.W.2d at 60–61.

C. Religious Upbringing Clauses Up Against the Wall: Free Exercise Implications and Structural Restraints on Government as Reducing Contractual Potency

1. Waiving Free Exercise Rights

The final point of analysis is considering whether enforcing a religious upbringing agreement runs the risk of violating the Free Exercise Clause, and if so, what rights are effectively waived by the agreement.[208] In *Weisberger*, the Court stated that "a religious upbringing clause should not, and cannot, be enforced to the extent that it violates a parent's legitimate due process right to express oneself and live freely."[209] For that reason, the court exclaimed that while it respected the parties' agreement, the weight of the evidence did not reveal that it would be in the children's best interest to have their mother "categorically conceal the true nature of her feelings and beliefs."[210] Unbeknownst to the court, it had created a new standard for constitutional protections up against contract law.[211] That standard suggests that even though a parent has contractually agreed to raise her children in accordance with a particular faith, the court will not enforce the clause wholly, but instead modify it to balance the children's religious practices with the parent's right to freely

208. *See infra* Section IV.C. As previously discussed, an obvious danger in enforcing a religious upbringing clause—thereby compelling one parent to act in conformity with a particular religion—is violating the protections of the Free Exercise Clause. *See* U.S. CONST. amend. I. Free Exercise rights of parents are one of the most obviously protected constitutional rights in child custody cases. *See* Beschle, *supra* note 148, at 414 ("Insisting that parents curtail religious practices or violate religious precepts in order to gain or retain rights of custody or visitation raises serious constitutional questions. Rules should be structured at least to minimize any interference with parents' free exercise of religion.").

209. *Weisberger*, 60 N.Y.S.3d at 275. The court also spoke to parental due process rights in exclaiming "it is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Id.* (citing Lee v. Weisman, 505 U.S. 577, 587 (1992)). While this Note has focused on the Free Exercise Clause in conjunction with the Establishment Clause in the interest of brevity, the relationship between free exercise rights and parents' substantial due process right to direct the upbringing of their children have historically been closely linked—sometimes even confused. *See* Bybee, *supra* note 37, at 890. As previously discussed, free exercise issues typically occur when "a parent must choose between religious practices and custody or visitation of children." *See* Beschle, *supra* note 148, at 416.

210. *Weisberger*, 60 N.Y.S.3d at 275. The court also found that it would be improper to "otherwise force her to adhere to practices and beliefs that she no longer shares." *Id.*

211. *See id.*

express herself.[212] Indeed, any other holding would traverse public policy, and for that reason, *Weisberger* sets forth an attractive new standard for lower courts to contemplate.[213]

The question remains, however, whether Chavie—the mother in *Weisberger*—and other parents in her position waived their constitutional protections in signing the religious upbringing document.[214] As previously discussed, a party may forgo his Free Exercise rights by entering into an agreement that effectively nullifies those rights.[215] In this way, contractual provisions may defeat constitutional protections.[216] In bringing a Free Exercise challenge to the enforcement of a religious upbringing clause, then, the very obvious response is to produce the document itself, with the complainant's signature, as evidence of the rights forgone.[217]

In *S.E.L.*, the New York Supreme Court found that while "[a] Court Order Which Adversely Impacts A Non-Custodial Parent's Free Exercise Of His Or Her Religion Would Be An Unconstitutional Infringement of First Amendment Rights,"[218] equally relevant was the fact that J.W., the father, had agreed in a stipulation of settlement that S.E.L, the mother, would have "absolute

212. *Id.* at 276. The agreement was modified to require that the mother still maintain a Kosher diet in the home at all times, but permitted both parents to otherwise exercise discretion while having the children in their custody. *Id.*

213. *See id.* at 275–76. Any public policy concerns related to religious upbringing agreements lie not within the formation of the agreement itself, but instead, in its enforcement. *See* Alexandra Selfridge, *Challenges for Negotiating and Drafting an Antenuptial Agreement for the Religious Upbringing of Future Children*, 16 J. CONTEMP. LEGAL ISSUES 91, 92 (2007). In enforcing the contract, then, the court must temper public policy concerns by ensuring that parents' First Amendment rights are not inadvertently flattened. *See id.* ("No court has held that agreements between parents about their children's religious upbringing violate public policy or the criminal law. The 'public policy' issue does not relate to the substance of the agreement, but rather to the enforceability of the agreement in the courts.").

214. *See* Karel Rocha, *Should Religious Upbringing Antenuptial Agreements Be Legally Enforceable?*, 11 J. CONTEMP. LEGAL ISSUES 145, 149 (2000) (discussing whether Free Exercise rights are waived in contractual agreements).

215. *See supra* Section II.B.

216. *See* Thaler, *supra* note 59, at 1788. This is less likely to be true if the contractual arrangement is made orally. *See* Zummo v. Zummo, 574 A.2d 1130, 1145 (Pa. Super. Ct. 1990); *infra* note 241 and accompanying text.

217. *See* Rocha, *supra* note 214, at 149 ("[T]he most justifiable infringement is that which the parties have chosen for themselves, rather than that which the court imposes upon them." (quoting Jocelyn Strauber, *A Deal Is a Deal: Antenuptial Agreements Regarding the Religious Upbringing of Children Should Be Enforceable*, 47 DUKE L.J. 971, 1006–07 (1998))).

218. S.E.L. v. J.W.W., 541 N.Y.S.2d 675, 677 (Fam. Ct. 1989) (capitalization in original).

custody and exclusive supervision" of their daughter Natalie.[219] The court concluded that because J.W. had agreed to abandon parental authority in the contract, he had forfeited his free exercise right of practicing his religion during visitation periods.[220]

S.E.L. stands for the proposition that religious freedom, as protected by the Free Exercise Clause, is discernably waived through freedom of contracting—pitting contract law above constitutional law—while *Weisberger*, twenty-eight years later, takes a slightly more sensitive approach in holding that a parent cannot be compelled to practice religion in order to maintain unsupervised custody, allowing constitutional protections to defeat contract law.[221] Perhaps, however, these disparate holdings can be attributed to the notable differences between the two cases.[222] In *S.E.L*, the father wished to expose his daughter to Jehovah's Witness practices, and failed to show how this exposure would not harm her.[223] In *Weisberger*, however, short of wanting to expose her children to a new or different faith, the mother in that case wished simply not to feign religious practice in front of her children in order to maintain custody.[224] Thus, less leniency is seemingly granted where a parent is attempting to expose her child to a new or existing religion, as in *S.E.L.*, than if a parent is attempting to extricate herself from the rigidity of an ultra-conservative practice, as in *Weisberger*.[225] In sum, when considering the Free Exercise Clause in relation to religious upbringing clauses, modern courts are rightly shifting toward a standard of fairness, and weighing constitutional protections as a heavier priority over contractual provisions.[226]

219. *Id.* at 679.

220. *Id.*

221. *Compare* Weisberger v. Weisberger, 60 N.Y.S.3d 265, 275 (App. Div. 2017), *with S.E.L.*, 541 N.Y.S.2d at 679.

222. *Compare Weisberger*, 60 N.Y.S.3d at 275, *with S.E.L.*, 541 N.Y.S.2d at 679.

223. *S.E.L.*, 541 N.Y.S.2d at 679.

224. *Weisberger*, 60 N.Y.S.3d at 275.

225. *Compare Weisberger*, 60 N.Y.S.3d at 275, *with S.E.L.*, 541 N.Y.S.2d at 679. Additionally, the court in *Weisberger* likely took stock of the fact that the mother, there, was not privy to the terms of the contract, and therefore holding her to the agreement would be unconscionable. *See* Raphelson, *supra* note 6; Otterman, *supra* note 8. For that reason, courts likely consider the level of agency in contractual agreements before determining whether Free Exercise rights have been effectively waived. *See supra* Section II.B.

226. *See* Rocha, *supra* note 214, at 150.

2. Defenses to Waiver Challenges and Structural Restraints on Government

Even in the face of a waiver challenge, a party may provide contract defenses to counter the agreement's enforceability.[227] As in *Weisberger*, Chavie and many other women in her position have been the victim of an antenuptial agreement, rather than the proponent of it.[228] Whether defenses of duress or unconscionability apply are case specific inquiries, and depending on the viability of the defense, may serve to vitiate the contract altogether.[229]

However, although it is clear that in certain circumstances a person may waive their Free Exercise right, and indeed, the court may in its discretion uphold such a waiver in enforcing the agreement, the potency of the contract is nonetheless diminished by structural restraints imposed on the government.[230] That is to say, while a person may waive her free exercise right, she may not waive the neutrality requirement imposed on the government in constraining entanglement of church and state.[231] For that reason, if the state oversteps its bounds by giving judicial deference to religion in child custody disputes, as did the trial court in *Weisberger*, no contractual provision can relieve the trial judge of his constitutional transgression.[232] Thus, while a person's free exercise rights may be contractually waived, the Establishment Clause's structural restraint on government maintains its force over religion in the courtroom, diminishing the efficacy of the agreement's force.[233]

227. *See supra* Section III.C.

228. *See* Otterman, *supra* note 56 and accompanying text.

229. *See supra* note 62 and accompanying text; Shelley Smith, *Reforming the Law of Adhesion Contracts*: *A Judicial Response to the Subprime Mortgage Crisis*, 14 LEWIS & CLARK L. REV. 1035, 1092 (2010) ("[O]ne who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power . . . signs a[n] . . . unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent . . . was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld." (quoting Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449–50 (D.C. Cir. 1965))).

230. *See* Hayden, *supra* note 63, at 243–44.

231. *See id.*; U.S. CONST. amend. I.

232. *See* Hayden, *supra* note 63, at 243–44.

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

V. CONCLUSION

So, what becomes of the vulnerable teenager who married a stranger she met but once?[234] What becomes of the autonomy she lost over her body, her faith, and the children she bore?[235] Is her latent realization of the woman she wanted to be crippled by her consent to a life she wants to forget?[236] Lower New York courts have continuously said yes, but appellate courts have constitutionally said no.[237]

When religious upbringing clauses bring contracts and the Constitution into conflict by compelling courts to consider religion, the Establishment Clause of the First Amendment guarantees that, although religion is a contractually obligatory point of consideration, it *cannot* be the determinative factor in child custody decisions.[238]

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234. *See* Yoked, *supra* note 1.

235. *See id.*; Dolsten, *supra* note 6 and accompanying text; Ausch, *supra* note 6.

236. In the two most current cases discussed, the mother made the decision to come out as a lesbian and leave the Hasidic community. *See* Ausch v. Ausch, 67 N.Y.S.3d 489, 489–90 (App. Div. 2018); Weisberger v. Weisberger, 60 N.Y.S.3d 265, 268–69 (App. Div. 2017); *see also* Ausch, *supra* note 6. In *Weisberger*, the mother was held to the signature on her antenuptial contract that promised to raise the children in accordance with the Hasidic faith. *Weisberger,* 60 N.Y.S.3d at 276.

237. *Weisberger*, 60 N.Y.S.3d at 275–76; Spring v. Glawon, 454 N.Y.S.2d 140, 141–42 (App. Div. 1982). Although the religious upbringing clause was enforced in those cases, there was no holding that the mother had to conform with the stipulated religion. *Weisberger*, 60 N.Y.S.3d at 275–76; *Spring*, 454 N.Y.S.2d at 141–42.

238. *See* Aldous v. Aldous, 473 N.Y.S.2d 60, 63 (App. Div. 1984); Gribeluk v. Gribeluk, 991 N.Y.S.2d 117, 118 (App. Div. 2014). In New York courts, if the antenuptial agreement states that the mother shall be the primary legal custodian, deviation from the religious upbringing clause will not warrant removal under the First Amendment or Article 10, but instead, the clause will be enforced to the extent that the children—not the mother—must continue their religious training while in their mother's care. *See* U.S. CONST. amend. I.; N.Y. FAM. CT. ART. 10 (2019); *supra* note 75 and accompanying text. It is also noteworthy that while this holding may be typical in New York cases, many courts outside of New York disregard the clause altogether for being vague or ambiguous. *See* Zummo v. Zummo, 574 A.2d 1130, 1144 (Pa. Super. Ct. 1990) ("1) [S]uch agreements are generally too vague to demonstrate a meeting of minds, or to provide an adequate basis for objective enforcement; 2) enforcement of such an agreement would promote a particular religion, serve little or no secular purpose, and would excessively entangle the courts in religious matters; and, 3) enforcement would be contrary to a public policy embodied in the First Amendment Establishment and Free Exercise Clauses . . . that parents be free to doubt, question, and change their beliefs, and that they be free to instruct their children in accordance with those beliefs."). Although the contract in *Zummo* was an oral agreement, which counted against enforcement, the court there nonetheless spoke of public policy concerns that are not mentioned in precedential New York holdings. *Compare id.* (where the religious upbringing agreement was not enforced, inter alia, due to public policy concerns that parents should be free to change their minds about their children's upbringing), *with Weisberger*, 60 N.Y.S.3d at 275–76, *and Spring*, 454 N.Y.S.2d at 141–42 (enforcing a religious upbringing document despite the

Although preferring one religion over another would have the proscribed effect of advancing or inhibiting religion, thereby failing the *Lemon* test, *Larson* carves out an exception to this rule in circumstances where protecting the child's well-being becomes a compelling state interest.[239] *Weisberger* consolidates precedential New York holdings into the current state of legal analysis by finding that religion may not be the determinative factor for consideration;[240] the state may only interfere in private religious affairs if the child's welfare is at stake;[241] and neutral principles of law must govern over religious upbringing agreements in child custody disputes.[242] The application of these neutral principles typically means that the contract will be left undisturbed as it pertains to the religious identity of the child, but a softened standard attaches to the religious identity of a parent who may have unwittingly waived her Free Exercise rights in signing the contract.[243]

While a person's free exercise rights may be contractually waived, the Establishment Clause's structural restraint on government maintains its force over religion in the courtroom.[244] In this way, while parents may not be free from waiver challenges to their Free Exercise rights, they are absolutely free from the danger of judicial deference to a religious upbringing clause.[245] Thus, giving undue weight to religious upbringing clauses in child custody cases violates the First Amendment of the Constitution, and even in the presence of contractual agreements, such a violation always survives a waiver challenge.[246]

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mother in both cases changing her mind about her children's upbringing).

239. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971); *see also* Larson v. Valente, 456 U.S. 228, 244, 246–47 (1982). This holding was ratified in *Spring*, alongside an application of "neutral principles of law" to contract enforcement. *See Spring*, 454 N.Y.S.2d at 141–42; *Larson*, 456 U.S. at 244.

240. *Aldous*, 473 N.Y.S.2d at 63.

241. *Larson*, 456 U.S. at 246–47. While this type of harm is usually in the context of a parent who joins an ultra-conservative sect that threatens punishment to the child, see Burnham v. Burnham, 304 N.W.2d 58, 60 (Neb. 1981), some courts find that divorced parents increase the risk of an injurious environment for the children. *See Zummo*, 574 A.2d at 1140 ("Some divorced parents may conduct such religious upbringing disputes in a more acrimonious and injurious manner than parents who remain married, and thereby create greater risk of harm to their children in more such cases.").

242. *Weisberger*, 60 N.Y.S.3d at 275.

243. *Id.* This holding is typical in New York courts, but may not necessarily be true in other jurisdictions. *See Zummo*, 574 A.2d at 1144.

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

245. *See supra* Part IV.

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

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Picture this: The parents of an estranged family push and pull at the judiciary who, spurred by the albatross of constitutional propriety, tightrope the line between religious freedom and religious agreements.[247] What is forgotten in the scramble for the biggest piece of the custodial pie?[248] Regrettably, the story's protagonist—the child.[249] Fifty pages and three decades of dragging the First Amendment from pillar to post later, what *is*, after all, the best interest of that child?[250] Perhaps a less loaded question would be, what is *not* in the child's best interest?[251] When a contract foreordains the forever-interest of the child, little wiggle room is left for changes of heart, expansion of mind, and freedom of spirit.[252] The writings in the custody contract, then, become the writings on the cradle wall.[253] While lacking jurisdiction to expunge these writings, the First Amendment at least keeps the cradle door open by safeguarding parents' Free Exercise rights and promising nonpartisanship in religious warfare.[254] To that end, when a contract raises its sword in a child custody dispute, Chavie, Etty, and the women before and after them, are safe behind the shield of the American Bill of Rights.[255]

247. *See* Ausch v. Ausch, 67 N.Y.S.3d 489, 489–90 (App. Div. 2018); *Weisberger*, 60 N.Y.S.3d at 275; Aldous v. Aldous, 473 N.Y.S.2d 60, 62–63 (App. Div. 1984).

248. *See, e.g.*, *Weisberger*, 60 N.Y.S.3d at 275.

249. *See, e.g.*, *id.*

250. *See* discussion *supra* Section III.A. The "best interest of the child" is the touchstone of custodial analysis. *See* discussion *supra* Section III.A.

251. *See* discussion *supra* Section III.A.

252. *See* Zummo v. Zummo, 574 A.2d 1130, 1144 (Pa. Super. Ct. 1990) ("[E]nforcement would be contrary to a public policy embodied in the First Amendment Establishment and Free Exercise Clauses (as well as their state equivalents) that parents be free to doubt, question, and change their beliefs, and that they be free to instruct their children in accordance with those beliefs.").

253. "The writing on the wall" is an idiom that portends a destiny of misfortune. *See* THE FREE DICTIONARY, https://idioms.thefreedictionary.com/the+writing+on+the+wall (last visited Sept. 23, 2019).

254. *See* discussion *supra* Part IV; U.S. CONST. amend. I.

255. *See Bill of Rights of the United States of America (1791)*, BILL OF RIGHTS INSTITUTE, https://billofrightsinstitute.org/founding-documents/bill-of-rights/ (last visited Sept. 23, 2019). The Bill of Rights are compromised of the first ten Amendments of the Constitution. *Id.* Since the Establishment Clause and Free Exercise Clause fall under the First Amendment, they fall within the Bill of Rights. *Id.*

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