One of the big themes that I think is going to be talked about for the foreseeable future has to do with the de-legalization of the family or legalizing particular statuses -- the whole question of whether or not marriage should be privileged as a status, which of course is tied into the debate about same-sex marriage, and whether civil union, or something short of same-sex marriage, accomplishes the same purposes.

Another angle on that is a question of whether the state should get altogether out of the marriage business so that marriage should be solely a religious question – something that is being talked about today in other conferences.

Another whole area that we are going to continue to deal with is the constitutionalization of family law. For example, we need to deal with whether or not there are limits to what is private and intimate behavior that the state shouldn’t have any interest in. The most recent Supreme Court example is Lawrence vs. Texas, the homosexual sodomy case. There is also the same kind of an issue in the abortion cases and in Troxel, the grandparent visitation case. How much should be private decisions? How much should the state intervene?

We see it also, in all the concern, maybe too great a concern, about domestic violence that tends to permeate a lot of family law.

A related question is whether or not the federal government should be involved or whether state government should. Part of what the Supreme Court has said – and I’ll talk about this a little bit
more – is that for certain parts of family law, anyway, it’s really a state court business, and particularly with child custody, divorce, and alimony.

We also are going to continue to be dealing with the choice – and the choice that courts are making and the choices that legislatures are making – between treating things that go on in the family as rights or treating them as part of a relationship, and that’s the part that I’m going to be talking about, and narrowly – for purposes of this conference – I want to talk about children’s religious rights.

This is from a quote from a 2004 Supreme Court decision.

[Slide 3 reads:]

"Banning further stated that her daughter is a Christian who believes in God and has no objection either to reciting or hearing others recite the Pledge of Allegiance, or to its reference to God. Banning expressed the belief that her daughter would be harmed if the litigation were permitted to proceed, because others might incorrectly perceive the child as sharing her father's atheist views." *Elk Grove v. Newdow*

The question is why the Court is doing this.

[Slide 4 reads:]

- The religious views of a child are at least relevant enough to mention in a Supreme Court majority opinion.
- The child was a kindergartener when the case was filed.

What’s unusual about this? First of all, it’s unusual that the Court is at least feeling that the views of the child are relevant enough to put them down in a majority opinion in a Supreme Court case. Jonas Yoder was the plaintiff in the Yoder versus Wisconsin case, one in which only Justice Douglas was willing to talk about – or consider really important – the religious views of a child.

This child – the child who’s involved in *Elk Grove v. Newdow* – was a kindergartener when the case was filed. So it’s not only that the opinion is worrying about the religious rights, or not, of a child, but also this is a very young child.

[Slide 5]

Steven goes on to write that the girl’s interests must be considered. He says the interests of this parent and this child – the father, who’s the non-custodial parent, and the child that he had out of wedlock – are not parallel and indeed are potentially in conflict. What the Court seems to be saying is that it is the conflict that’s involved that’s going to override the presumption that a fit parent speaks for the child, and should always be the spokesperson for the child and is capable of making decisions for the child.
Where does the presumption come from? One view – a view that’s going to be really unpopular with this audience – is an economic view. Economist Gary Becker espouses that parents’ and children’s utility functions are interdependent. In other words, what makes the kid happy is also going to make the parent happy. Therefore, you can assume that if the parent is speaking for the child that the child is going to be better off.

Another that may be more popular with this audience is a view of John Locke; that is, that children, while they remain minors, are imperfect. They’re not totally capable of making rational decisions. Somebody’s got to do it, and that person is going to be the parent.

John Locke--Making up for imperfections of childhood:
"The power, then, that parents have over their children arises from that duty which is incumbent on them to take care of their offspring during the imperfect state of childhood. To inform the mind, and govern the actions of their yet ignorant nonage, till reason shall take its place and ease them of that trouble, is what the children want, and the parents are bound to…. The freedom, then, of man, and liberty of acting according his own will, is grounded on his having reason, which is able to instruct him in that law he is to govern himself by, and make him know how far he is left to the freedom of his own will."

Another way of thinking about this is the view that Elizabeth and Robert Scott espouse, which is that parents are acting as fiduciaries for their children. They’re given a lot of power over decision making in order to reward them for their consistent good behavior over time with very little tangible reward.

So one of the questions that the law asks, and that I like to think about, is whether there are ever times when our confidence that parents are speaking for their kids is misplaced. The way that I rephrase that is to think about when is it that parents are likely to be thinking about themselves, rather than about their kids. One possibility, and the one that tends to surface in the grandparent visitation cases – cases on the statutes that have been written in response to the *Troxel* case – is that they’re going to allow grandparents to try to seek some sort of custody access in times after the divorce of the parents, or after the death of one of the parents, or when the fitness of the parents is being contested. In all of those cases, it may be that the parents are really thinking not so much about their children and more about their own interests.

So what do we do? If the work of the parent is shouldering most of the responsibility, most of the weight, should we listen to the parent, or should we listen to the child? And the real question
– the question that’s really related to this conference, as opposed to my interest in this topic in general – is whether or not it matters what kids’ religious beliefs are, frankly. I mean, should we just forget about it and load them in the car and tote them off to church or Sunday school or religious training until they’re 18, and then let them make up their own minds? Or should we really think about what they’re doing on their own? Is the presumption valid when we’re thinking about what kind of religious beliefs are in the child’s best interests?

And what I want to do is to be unpopular once again and to give you an empirical look at what kind of outcomes you get based on various things that might measure religiosity that kids might be exposed to.

[Slide 11]

This is a very big national dataset. It’s about 9,000 kids who have been followed since 1979. They’re now parents themselves, so it’s their children that are the subject in 1997 of the survey. It’s on the Bureau of Labor Statistics website, and the study is being carried out at Ohio State. I have absolutely nothing to do with it, I’m just using their data. There are about 3,000 kids – about 2,980 kids who are between 12 and 14 for whom all the questions that we want to look at are answered, and it’s a nationally representative weighted sample to try to get at different parts of the population all over the country.

We’ve run a whole series of equations. We’re trying to predict two different outcomes that you’re going to see. One of them is a measure of optimism – how often do I think good things are going to happen to me? And the other one is delinquency.

We begin with a presumption that would be very common in economics, which is the more money you have, the happier you’re going to be and the less trouble you’re going to get into. And then we start with just that one explanatory variable, and add other ones dealing with family structure, legal relationships between the parents, and other socio-demographic data like race and gender of the child, education of the mother, age of the child.

[Slide 12]

Finally, we add the two terms that we’re really interested in. They don’t directly measure children’s religiosity, but they measure parents’ religiosity. They are (1) how often do you say that your parents pray, or go to religious services, or do something else religious, and (2) how many of your peers attend worship services.

[Slides 13-18]

Regarding parents, the first question asks how many days from zero to seven do you do something religious (religious as a family), such as go to church, or pray, and read the scriptures together. There are also other non-religious kinds of activities to select. The second question is do you live in a family where you have a stepdad or not. The third question is if your parents are cohabiting. The fourth asks how old your mom was when she had a first child. The fifth one is
how old she is now, how many years of schooling she had. So these are all sorts of socio-demographic variables. There are also a number of race variables.

Nothing seems to matter a whole lot, really, except maybe that mom’s years of school seem to increase happiness some, and so does more wealth. Also, if you live with cohabiting parents, you’re less likely to think that good things are going to happen to you.

As for delinquency, older kids are more likely to be delinquent. Kids who are adopted and with stepmoms also tend to be more delinquent.

Regarding optimism, the study shows that when needs are met and parents attend religious services, kids are more optimistic about good things happening to them.

Delinquency, on the other hand, shows a small drop based on how much money your family has. But there’s a big drop based on whether or not your peers go to church a lot. And, there’s just a small difference based on what your parents do.

[Slides 19-20]

What do we have then? It looks as though parental religiosity is related to adolescents’ outlook on life in an important way. Further, for these young people, the religiosity of their peers is more related to their behavior, not only on the delinquency index we reported, but also for substance abuse and general behavioral problems.

For these young people anyway, the religiosity of their peers is related to actually doing things, as opposed to having good or bad outcomes. It’s also true, as for general behavioral problems: it’s true for substance abuse as well. So it looks like children’s religion does matter.

[Slide 21]

Children’s religion does matter, sometimes in the context of their parents’, and sometimes, as they grow, in the context of their peers. This corresponds to the findings of social psychologists who suggest that peers may be critically important for adolescents. Activities done with the family have important relationships to lower delinquency, less substance abuse and fewer behavioral problems. The ads about knowing where your kids are may actually be “onto something.”

It matters as far as the outcomes that you have related to the child. Or at least their parents’ religion matters, or their friends’ religion matters, because we don’t have the exact variable that we want. And it looks like it’s really important -- it’s important as how wealthy they are. It’s more important than a whole lot of other things.

This suggests – especially the findings of the influence of your peers – that, at adolescence, we start depending less on our parents, who may be really important for our core beliefs and outlook on the world, and are more and more influenced by the people who are around us – our friends.
and those with whom we hang out. And this suggests that all the ads about “do you know where your child is?” and about the aware and nagging parent is the best reducer of drug dependence may actually be onto something.

One of the questions is whether or not it’s appropriate, and we ought to think about kids’ religiosity in really restrictive terms, and the American Law Institute’s proposals are going to get kicked around by Don, I think.

[Slide 22 reads:]

In issuing orders under this Chapter, the court should not consider any of the following factors:
(a) the race or ethnicity of the child, a parent, or other member of the household;
(b) the sex of a parent or the child;
(c) the religious practices of a parent or the child, except to the minimum degree necessary to protect the child from severe and almost certain harm or to protect the child's ability to practice a religion that has been a significant part of the child's life;

They have child custody provisions that say that it should be inadmissible, or that the court shall not consider, any of the following factors in deciding who should get child custody, including “the religious practices of a parent or the child except to the minimum degree necessary to protect the child from severe and almost certain harm or to protect the child's ability to practice a religion that has been a significant part of the child’s life.” How the heck is the court going know that, especially in relation to the pervasiveness of the factors that we’ve discussed before? I also want to look at another Supreme Court case.

[Slide 23]

In Hodgson v. Minnesota, which involved an unusual Minnesota statute that required both parents be notified before their minor child could obtain an abortion unless there was a judicial bypass procedure, Justice Stevens, writing for the majority, noted: “It follows that the combined force of the separate interest of one parent and the minor’s privacy interest must outweigh the separate interest of the second parent.”

As it was with the privacy cases, so it may be with the religion cases—if the child identifies with one parent, he or she should surely prevail against the other.

And that’s what’s going on in the first case we talked about, the Newdow case, where you had one parent, the custodial mom, plus the child, who says she’s a Christian, outweighing the interests of the non-custodial parent. It also follows the whole doctrine about when you’re able to engage in child custody litigation at all, a standing doctrine that suggests that sometimes what’s needed is the presence of one child and a parent in the jurisdiction, that this is going to be enough to get the power of the court involved, although that’s stretching things a little bit here.

[Slide 24]
Please know that the data I presented is like a snapshot. They don’t represent causation. They represent things that occur at the same time. We have no way to prove that factors like living with a stepparent cause more delinquency, or less happiness. We know that they’re associated and that’s all we can tell.

Thank you.