

RELIGION, WOMEN, AND THE HOLY GRAIL OF LEGAL PLURALISM

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INTRODUCTION

One of the most challenging questions the United States has faced throughout its history is how much space should be provided to religious minorities to govern themselves. Religious tribunals including Christian organizations such as Peacemaker Ministries and Beth Dins (Jewish courts) routinely resolve doctrinal disagreements, as well as commercial and family law disputes,¹ and there are now also a growing

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¹ See Michael C. Grossman, Note, *Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process*, 107 COLUM. L. REV. 169, 177–81 (2007).

number of forums for Islamic Arbitration.² While it is hard to find fault in the basic idea that parties should be permitted to structure their relationships, and adjudicate their disputes, based on shared values, the question this Article poses is whether unfettered religious autonomy runs the risk of excluding parties to religious contracts from the civil courts, thereby potentially compromising important individual liberties. This question embodies two main inquiries: first, whether a misreading of the Supreme Court's constitutional guidelines on the Religion Clauses has unnecessarily deprived the civil courts of any meaningful authority to resolve religious disputes; and second, even if courts were deemed to have the constitutional authority to review religious disputes, under what circumstances would it be appropriate for the judiciary to defer to the holdings of religious arbitral forums.

The answer to the first question is contextual and certainly depends on the specific area of dispute. However, because the push for legal pluralism is often expressed in terms of family law where the ideal of religious autonomy may come into conflict with potential violations of other important rights, this Article examines the issues of judicial authority to review religious disputes, as well as deference to religious arbitration, through the prism of a diverse selection of Jewish and Islamic divorce cases.

The second question relates to the practice of arbitration where, based on the Supreme Court's interpretation of the Federal Arbitration Act (FAA),³ many civil courts (applauded by a growing number of scholars) readily accede to the holdings of religious arbitral bodies without paying much attention to the underlying substantive issues that shaped the original dispute. Critics of deference to religious arbitration worry that authorizing autonomous religious governance could lead to the violation of the civil rights of individual group members through what one scholar calls "odious discrimination,"⁴ and potentially impact "substantial public and third-party interests"⁵ by reinscribing into law

² See Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1249–52 (2011) (citing examples of initiatives for the establishment of Islamic arbitration venues such as the Fiqh Council of North America).

³ See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (holding that the resolution of an age discrimination claim pursuant to an arbitration agreement precluded resort to the civil courts); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (extending presumption in favor of arbitration to disputes under the Securities Act of 1933).

⁴ Laura S. Underkuffler, *Odious Discrimination and the Religious Exemption Question*, 32 CARDOZO L. REV. 2069, 2072 (2011) (focusing on women, Underkuffler concludes that gender discrimination may not be excused when defendant claims religiously compelled bias, otherwise we would be sanctioning "religiously based, odious discrimination").

⁵ Leslie C. Griffin, *Smith and Women's Equality*, 32 CARDOZO L. REV. 1831, 1852 (2011) (internal quotation marks omitted).

through a back door “discrimination that has only recently been ameliorated.”⁶

Part I of this Article provides a broad overview of the Supreme Court’s general guidelines for evaluating the constitutionality of government actions under the Religion Clauses of the First Amendment. The inquiry under the Establishment Clause is whether resolution of disputes emanating out of a religious agreement constitutes an establishment of religion by the government. Although the landscape of Establishment Clause jurisprudence is unsettled, it seems likely that, based on the Court’s latest rulings in *Salazar v. Buono*,⁷ *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*,⁸ and *Van Orden v. Perry*,⁹ religious divorce cases would probably be subject to a mix of the *Lemon* and endorsement tests.¹⁰ Under the Free Exercise Clause, the question boils down to whether the civil courts’ resolution of religious disputes interferes with the defendant’s constitutional right to exercise freely his religion.

Many of the lower courts’ decisions focus on the third prong of the *Lemon* test and struggle with how they may resolve a religious dispute without “entanglement in questions of religious doctrine.”¹¹ The Supreme Court offers two options for overcoming this dilemma. First, under the deference approach, courts, when reviewing internal church disputes, may defer to the holdings of the highest authority within the religious institution where the disagreement arose.¹² Second, pursuant to the neutral-principles approach, civil courts may resolve religious disputes using secular legal rules circumventing the need to rely on theological standards.¹³ While the Supreme Court may have intended

⁶ Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540, 590 (2004) (focusing on the tension between religious pluralism and gender discrimination, Estin states that “it is important to protect against re-inscribing into our family law the gender discrimination that has only recently been ameliorated”).

⁷ 559 U.S. 700 (2010).

⁸ 545 U.S. 844 (2005).

⁹ 545 U.S. 677 (2005).

¹⁰ These tests are examined in Part I. See *infra* text accompanying notes 21–29. Undoubtedly, some readers will feel strongly that the correct standard to apply is the coercion test. This Article addresses this argument directly in Part I. See discussion *infra* text accompanying notes 36–48.

¹¹ *Jones v. Wolf*, 443 U.S. 595, 603 (1979).

¹² See, e.g., *Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevic*, 426 U.S. 696 (1976) (holding that the First Amendment mandates absolute judicial deference to internal church rules for the selection and removal of archbishops); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440 (1969) (holding that under the First Amendment absolute judicial deference to internal church rules for holding title to property is required).

¹³ *Jones*, 443 U.S. at 602–04. While some courts have read *Jones* narrowly by limiting it to the resolution of property disputes among churches, see, e.g., *Kinder v. Webb*, 396 S.W.2d 823, 824 (Ark. 1965), most have interpreted it broadly enough to apply the “neutral principles of law” standard to all religious disputes, see Marci A. Hamilton, *Religious Institutions, the No-*

that the two standards operate harmoniously, Part I.B examines whether the deference and neutral-principles approaches give rise to conflicting guidelines and cause considerable confusion and inconsistency in the lower courts. As a result, many courts may unnecessarily choose to abstain from hearing any kind of religious dispute,¹⁴ and some scholars view the slightest cleavage in what they refer to as the Court's church autonomy doctrine with alarm.¹⁵

Parts II.A and II.B examine a broad cross-section of Jewish and Islamic divorce cases. The Jewish divorce cases center on the husband's refusal to grant a *get*, a Jewish divorce, thereby denying his wife the option of remarrying and having children within the parameters of her faith. In reviewing the *get* cases, this Article evaluates both whether courts may resolve these disputes and whether the remedies awarded in the *get* decisions, which typically entail an order of specific performance to grant a *get* or appear before the Beth Din, pass constitutional muster. In the Islamic divorce cases, this Article explores whether courts correctly apply the neutral-principles approach to identify a suitable secular tool with which to intervene in the parties' dispute concerning the *mahr* provision.¹⁶ The *mahr* decisions show that when lower courts do not understand the precise nature of a religious provision, they often reach for a secular tool that bears very little resemblance to the religious article, resulting in interpretations that do not reflect the parties' intent.¹⁷

In Part III, having established that courts may substantively review religious disputes, this Article circles back to the task of evaluating the degree of autonomy religious arbitration forums should enjoy free of oversight from the civil judiciary. What is the big deal? One may ask. Even outside the religious paradigm, parties' rights are continuously compromised in arbitral proceedings. Surely, this is a small price to pay for an efficient system of binding arbitration. While the superficial symmetry of this argument may be appealing, the roots of the comparison are in fact rather skewed. Secular arbitration standards

Harm Doctrine, and the Public Good, 2004 BYU L. REV. 1099, 1115 (acknowledging, with approval, the Supreme Court's directive that courts must "obey neutral principles of law in the religious institution cases under the Establishment Clause").

¹⁴ See, e.g., *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 2 (Tex. 2008) (interpreting the Religion Clauses of the First Amendment to shield ecclesiastical institutions from liability and thus barring recovery under tort law in suit against church).

¹⁵ See, e.g., Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1388-402 (1981); see also Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493 (2013) (referencing the "church autonomy doctrine").

¹⁶ A *mahr* is a gift from the husband to the wife for entering into the marriage contract, see RAJ BHALA, UNDERSTANDING ISLAMIC LAW (SHARI'A) § 35.02[A] (2011), and should be distinguished from a dowry, which in some cultures is brought by the bride to the marriage.

¹⁷ See discussion *infra* text accompanying notes 136-40.

share the same spirit as general civil law, whereas religious arbitration is grounded in sectarian rules that in certain areas, such as family law, profoundly conflict with civil law. Handicapping courts' oversight of a radically different and potentially discriminatory legal regime means that the individual rights of the party challenging the religious arbitration award may be compromised under rules that violate equity norms and diverge dramatically from civil standards by which he or she would ordinarily be judged in a secular forum. One possible solution to this dilemma is to permit deference to religious arbitration when there is convergence between the goals and standards of the applicable religious and secular laws, but otherwise to limit deference and require courts to apply the neutral-principles approach when norms underpinning sectarian and secular rules diverge dramatically.¹⁸

The sheer scope of this topic invariably limits this Article's ambitions to raising some of the more critical issues rather than definitively resolving the contours of the law in this area. Inevitably, important questions, including the potential impact of community pressure on members to subscribe to religious norms when confronted with an opt-out scheme, will remain unexplored. Nevertheless, identifying the extent of the judiciary's authority to resolve religious disputes is not only critical to the successful implementation of a plural legal system, but also vital to everyday concerns of many Americans who use religion as an anchor for their personal relationships.

I. SUPREME COURT GUIDANCE

The Religion Clauses of the Constitution provide two seemingly conflicting mandates. The Establishment Clause states, "Congress shall make no law respecting an establishment of religion," while the Free Exercise Clause forbids the passage of laws which "prohibit[] the free exercise thereof."¹⁹ Evaluating the judiciary's authority to address religious disputes raises both Establishment and Free Exercise concerns, although Establishment Clause issues typically loom larger. This Part broadly surveys the Supreme Court's general guidelines for evaluating the constitutionality of government actions under the Religion Clauses of the First Amendment. The inquiry under the Establishment Clause is whether resolution by the judiciary of disputes emanating out of a religious agreement constitutes an establishment of religion by the government. Under the Free Exercise Clause, the question boils down to

¹⁸ For a discussion of how a convergence standard can be used to determine under what circumstances it is appropriate for the civil judiciary to defer to the holding of religious tribunals, see *infra* text accompanying notes 269–87.

¹⁹ U.S. CONST. amend. I.

whether civil courts' adjudication of religious disputes interferes with the defendant's constitutional right to exercise freely his religion.

A. *Supreme Court Guidance on the Establishment Clause*

There is no settled Supreme Court test pursuant to which the constitutionality of government actions may be evaluated under the Establishment Clause. The latest collection of Supreme Court decisions suggests, however, that Establishment Clause challenges in family law disputes would probably be subject to a mix of the *Lemon* and endorsement tests.²⁰ Some readers may object that in fact the correct standard to apply is the court's coercion test, after all what is more coercive than a court order commanding a party to engage or not engage in what some may deem purely religious acts? While this is an important observation, I propose that the Court may be willing to limit the coercion test's application to cases where the state is directly sponsoring a religious act, such as a religious prayer or the display of religious symbols. Before addressing the limitations of the coercion test in greater detail, this Article first briefly describes the *Lemon* and endorsement tests.

In its 1971 *Lemon v. Kurtzman* decision, the Supreme Court outlined a three-pronged test for evaluating whether a government action passes muster under the Establishment Clause of the First Amendment.²¹ Pursuant to the *Lemon* test: first, the government action must "have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion;" and third, it "must not foster an excessive government entanglement with religion."²² In *Lemon*, the Court struck down two state statutes that provided government funding to non-public (mostly Catholic) schools, because the statutes fostered "an impermissible degree of entanglement" between government and religion.²³

However, since its inception in 1971, the *Lemon* test has come under consistent criticism as inadequate for ascertaining the constitutionality of government action under the Establishment Clause. Much of the criticism has focused on the second and third prongs of the test, prompting the Supreme Court in its subsequent decisions to attempt a synthesis of the effect and entanglement analysis by making

²⁰ See *Salazar v. Buono*, 559 U.S. 700 (2010); *McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005).

²¹ *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971); see also EUGENE VOLOKH, *THE RELIGION CLAUSES AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS* 3–6 (2005) (presenting an excellent overview of the *Lemon* test).

²² *Lemon*, 403 U.S. at 612–13 (internal quotation marks omitted).

²³ *Id.* at 615.

entanglement “an aspect of the inquiry into a statute’s effect.”²⁴ The resulting “endorsement test,” pioneered primarily by Justice O’Connor, asks whether the government acted “in ways that are reasonably perceived as endorsing (or disapproving of) religion, or that are intended to endorse (or disapprove of) religion.”²⁵ In other words, government practice must “not have the effect of communicating a message of government endorsement or disapproval of religion” to a reasonable observer.²⁶ Moreover, Justice O’Connor has clarified that the endorsement test’s reasonable observer is “more informed than the casual passerby,” such that the test creates a more collective standard to measure “the objective meaning of the [government’s] statement in the community.”²⁷ As a result, under the endorsement test, courts are required to consider the context and “unique circumstances” of each case²⁸ and to treat believers and non-believers on an equal footing such that an objective observer would not think the government is endorsing any particular form of religious orthodoxy.²⁹

While, the shift from the *Lemon* to the endorsement test has not eliminated all the inconsistency in the Court’s Establishment Clause decisions, it has brought to the fore the importance of evaluating the context of a government action in its Establishment Clause analysis. In *Lynch v. Donnelly*, where Justice O’Connor first proposed the endorsement test in a concurring opinion, the Court upheld the constitutionality of the city of Pawtucket’s display of a crèche because, “[w]hen viewed in the proper context of the Christmas Holiday season, . . . there [was] insufficient evidence to establish that the inclusion of the crèche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message.”³⁰ Five years later, when faced with another governmental display of the nativity scene, the Court’s holding seemed to contradict *Lynch*’s outcome.³¹ In *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, the Court held the city’s display of a crèche to be unconstitutional because, unlike the Pawtucket display,

²⁴ *Agostini v. Felton*, 521 U.S. 203, 233 (1997); see *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (O’Connor, J., concurring) (stating that the endorsement test “folded the entanglement inquiry into the primary effect inquiry” (citing *Agostini*, 521 U.S. at 203, 218, 232–33)).

²⁵ VOLOKH, *supra* note 21, at 182.

²⁶ *Lynch v. Donnelly*, 465 U.S. 668, 692 (O’Connor, J., concurring).

²⁷ *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O’Connor, J., concurring in part and concurring in the judgment) (alteration in original) (quoting *Lynch*, 465 U.S. at 690 (O’Connor, J., concurring)) (internal quotation marks omitted).

²⁸ *Id.* at 782 (citing *Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 629 (1989)).

²⁹ *Lynch*, 465 U.S. at 692 (O’Connor, J., concurring) (“What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion.”).

³⁰ *Id.* at 680.

³¹ See *Cnty. of Allegheny*, 492 U.S. at 598.

which stood next to secular items including a plastic reindeer and a Santa Clause, Allegheny County's crèche was not juxtaposed against secular symbols and, consequently, "nothing in the context of the display detract[ed] from the crèche's religious message."³² By contrast, the Court upheld the constitutionality of Allegheny County's display of a Hanukkah menorah in part because it was positioned under a massive Christmas tree ("a secular symbol of the Christmas holiday season"³³), emphasizing that the display had both a "religious and secular" message, thereby minimizing the likelihood that a reasonable member of the community would believe the menorah symbolized government endorsement of Judaism.³⁴ The lack of consensus in the Court's *Lynch* and *Allegheny* opinions has caused deep confusion in the lower courts,³⁵ but suggests that the Court is more likely to uphold the constitutionality of a religious display if it is accompanied by a secular artifact.

While the Supreme Court's latest decisions in the Ten Commandment cases³⁶ continue to support the premise that the religious divorce disputes should be evaluated pursuant to a mix of the *Lemon* and endorsement tests, the Court's tepid application of the endorsement test in *Salazar v. Buono*³⁷ may prompt some observers to propose that the no-coercion principle, which deems unconstitutional any government sponsored program found to coerce religious observance, would be a more appropriate test to apply. I believe, however, that the Court may be willing to limit the coercion test's

³² *Id.* at 598.

³³ *Id.* at 635 (O'Connor, J., concurring in part and concurring in the judgment).

³⁴ *Id.* at 613–14 (majority opinion).

³⁵ See Christopher Lund, *Salazar v. Buono and the Future of the Establishment Clause*, 105 NW. U. L. REV. COLLOQUY 60, 71 (2010) (declaring that *Salazar v. Buono*, 559 U.S. 700 (2010), did not relieve the confusion created by *Allegheny* and *Lynch* and instead "leaves us where we started—in a state of mild confusion . . . , definite uncertainty about the legal rule, and eager anticipation of the next case").

³⁶ The Supreme Court announced the *McCreary* and *Van Orden* decisions on the same day, and both involved displays of the Ten Commandments. The ten opinions making up the two decisions revealed deep divisions between the Justices on Establishment Clause principles. See VOLOKH, *supra* 21, at 138. The *McCreary* majority held that the display of the Ten Commandments (juxtaposed against an ever-changing selection of historical documents) violated the Establishment Clause because "the primary purpose of the displays was to endorse the Ten Commandments, rather than to show a wide array of historical legal sources that happened to include the Ten Commandments." See *id.* In *Van Orden*, the Court, in a plurality opinion, upheld the display of the Ten Commandments, with Justice Breyer declaring, in his controversial but controlling opinion, that "[t]he Establishment Clause was aimed at preventing religious divisiveness." See *id.* at 139. Justice Breyer also noted that "the presence of endorsement" constituted a relevant portion of the analysis. See *id.*

³⁷ See *Salazar*, 559 U.S. at 721–22 (holding that a cross placed on a rock outcropping as a World War I memorial on federal land did not constitute an endorsement of Christianity, but rather honored the sacrifices of veterans); see also Lund, *supra* note 35, at 70 (arguing that the Court's ambiguity in *Salazar* is not worrisome because, in Establishment Clause decisions, "the cases have always been more important than the tests, because the tests are too manipulable to do much work on their own").

application to cases where the state is directly sponsoring a religious act, such as a religious prayer or the display of religious symbols.

In *Lee v. Weisman*,³⁸ the Court held that clergy-led prayer at a public school graduation ceremony was “inconsistent with the . . . Establishment Clause of the First Amendment”³⁹ and stated that the appropriate inquiry turned on whether “the machinery of the State” was used to “coerce” those present at the prayer event.⁴⁰ The Justices differed greatly in their understanding of what constitutes coercion, with Justice Kennedy, writing for the majority, defining coercion very broadly to include indirect psychological pressure,⁴¹ while Justice Scalia’s dissent considered only behavior that results in a direct penalty to be coercive.⁴² Justice Kennedy’s broad interpretation of coercion places far greater constraints on the government’s use of religious symbols and worship than Justice Scalia’s much narrower definition.

Several distinctions can be drawn between the types of cases the coercion test has been applied to (mostly worship and symbol cases) and religious family law disputes. First, worship and symbol cases often involve sponsorship by a state official or entity of a religious activity.⁴³ In *Lee*, as Justice Kennedy noted, the choice to include an invocation or a benediction was directly “attributable to the State,” and without the state making such a selection, there would have been no such religious ceremony.⁴⁴ By contrast, in the *mahr* and *get* cases, the state plays no role in forcing the parties to enter into a religious agreement or in bringing the disputes to the courts. Instead, private individuals decide voluntarily to litigate their personal disagreements that emanate out of religious arrangements. This distinction is important because Justice Kennedy found the “pervasive” “involvement with religious activity” by “[s]tate officials [who] direct the performance of a formal religious exercise at . . . graduation ceremonies” to be a critical element because it meant that even students who objected to the religious ceremony felt that their attendance was “in a fair and real sense obligatory.”⁴⁵

³⁸ 505 U.S. 577 (1992).

³⁹ *Id.* at 598–99.

⁴⁰ *Id.* at 587, 592.

⁴¹ *Id.* at 592–94.

⁴² *Id.* at 640–42 (Scalia, J., dissenting); see also *McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 908–09 (2005) (Scalia, J. dissenting) (stating that government display of Ten Commandments was constitutional since there was no evidence of coercion or intent to further religious practice); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000) (holding that pressure to attend a football game accompanied with government-sponsored prayer is unconstitutional coercion under the Establishment Clause).

⁴³ See, e.g., *Lee*, 505 U.S. at 581 (principal “invited a rabbi to deliver prayers at . . . graduation exercises”).

⁴⁴ *Id.* at 587.

⁴⁵ *Id.* at 586–87.

Second, Justice Kennedy's opinion in *Lee* strongly implies that the coercion standard embodies an element of intent in undertaking the government action: he states that the inspiration for the Establishment Clause comes from a desire to prevent the execution of policies that "indoctrinate and coerce . . . [a] state-created orthodoxy [which] puts at grave risk that freedom of belief and conscience."⁴⁶ One may reasonably extrapolate that for a majority of the Justices on the Court, in order for government action to be deemed coercive, it must have been made with the intent to promote a certain religious viewpoint. In *mahr* and *get* cases specifically, courts are not driven to issue orders of specific performance because of their support for a particular religious orthodoxy; instead they merely wish to enforce the parties' original contractual arrangement.

This points to the final distinction between the impact of applying the coercion standard to the worship and symbol cases versus the religious family law cases. In the former group, the debate principally centers on whether the government is violating the Religion Clauses of the First Amendment, but does not directly implicate the denial of other important rights to individuals allegedly coerced to participate in the state sponsored religious activity. In the religious divorce cases, however, any concern about whether judicial review of religious decisions violates the Religion Clauses needs to be balanced against a converse worry regarding whether the denial of judicial review could result in loss of other compelling interests, such as gender equality. Courts' abstention from adjudicating religious family law decisions may implicitly put the government in the position of rubber-stamping religious decisions (especially religious arbitral awards), which often times may be grounded in theological rules granting women substantially fewer rights, or at least vastly different rights, than men.⁴⁷

For the above reasons, I propose that both Justice Kennedy's and Justice Scalia's versions of the coercion test would be inappropriate for evaluating the constitutionality of government actions in religious family law disputes. I believe that the Supreme Court's guidance continues to call for an evaluation of the lower courts' *get* and *mahr* decisions according to a mix of the endorsement test and a truncated *Lemon* test. However, because many lower courts focus on the third prong of the *Lemon* test and struggle with how religious disputes may be resolved without "entanglement in questions of religious doctrine,"⁴⁸ Part I.B offers a brief examination of the Supreme Court's guidance on

⁴⁶ *Id.* at 592 (emphasis added).

⁴⁷ In addition, closing the courts' doors to parties who are seeking a hearing in a neutral, non-biased, civil forum would handicap the neutral-principles approach and take the courts back to a strict non-justiciability regime. See discussion *infra* Part I.B.

⁴⁸ *Jones v. Wolf*, 443 U.S. 595, 603 (1979).

how this dilemma may be addressed. In addition, prior to turning specifically to the religious divorce cases, Part I.C will address the High Court's guidance on the Free Exercise Clause to determine whether a plausible range of remedies ordered in religious family law cases could potentially violate defendants' constitutional rights to freely practice their faith.

B. *The Deference Approach vs. The Neutral-Principles Approach*

The Supreme Court's Religion Clauses jurisprudence limits the judiciary's ability to decide whether religious beliefs make sense,⁴⁹ are true,⁵⁰ or are consistent with the teachings of a particular religious doctrine,⁵¹ but permits courts to use "neutral principles of law" to interpret religious agreements in "purely secular terms."⁵² The Court first prohibited intrusion into religious belief in *Watson v. Jones*,⁵³ in what eventually came to be known as the deference approach, and reiterated its position in some of the modern church-dispute cases.⁵⁴ Subsequently, the Court articulated the neutral-principles doctrine, which empowers the judiciary to intervene in religious disputes that reach beyond issues of belief by using secular legal standards without recourse to theological doctrine.⁵⁵ In *Jones v. Wolf*, the Supreme Court held that the neutral-principles-of-law approach is "consistent" with constitutional restrictions and will "free civil courts completely from entanglement in questions of religious doctrine, polity, and practice."⁵⁶ The *Jones* majority acknowledged that the use of neutral principles "requires a civil court to examine certain religious documents," but stressed that this could be done by evaluating "the document in purely secular terms."⁵⁷ Overall, the *Jones* majority concluded that "the promise of nonentanglement and neutrality inherent in the neutral-principles

⁴⁹ See, e.g., *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.").

⁵⁰ See, e.g., *United States v. Ballard*, 322 U.S. 78, 81 (1944).

⁵¹ See, e.g., *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449–50 (1969).

⁵² *Jones*, 443 U.S. at 604; see also VOLOKH, *supra* note 21, at 3–6.

⁵³ 80 U.S. (13 Wall.) 679 (1871).

⁵⁴ See Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1863 (1998) (stating that the deference approach "goes back to *Watson v. Jones*").

⁵⁵ The Court first suggested the neutral-principles doctrine in *Presbyterian*, 393 U.S. at 450, and later fully sanctioned it in *Jones*, 443 U.S. at 602–04.

⁵⁶ *Jones*, 443 U.S. at 602–03.

⁵⁷ *Id.* at 604.

approach more than compensates for what will be occasional problems in application.”⁵⁸ In this way, the Court clarified that its earlier decisions did not advocate a blanket non-justiciability approach to Religion Clauses jurisprudence.

Although the Supreme Court has drawn the line of non-interference at belief, some lower courts have misunderstood these guidelines and have adopted the position that the Court’s Religion Clauses jurisprudence gives the judiciary the option to choose between the deference and neutral-principles approaches to ascertain whether they could intervene in a religious dispute.⁵⁹ This has prompted a number of courts to expand the deference approach beyond internal church disagreements concerning belief and apply it to any dispute emanating out of a religious agreement. Courts that reject the neutral-principles doctrine feel obligated to either recuse themselves from adjudicating a religious dispute or to defer to the holdings of the highest authority within the parochial institution where the disagreement arose (including any related arbitral body).⁶⁰ This has impacted a very broad range of disputes including family law matters,⁶¹ tort cases,⁶² and employment practices.⁶³

Proponents of the deference approach allude to judicial incompetence and separation of church and state as the key reasons for prohibiting courts from intervening in religious disputes. Characterizing religion as a private matter, beyond the grasp of civil authorities, might be convincing if such a charge is limited solely to

⁵⁸ *Id.*

⁵⁹ See Nathan Clay Belzer, *Deference in the Judicial Resolution of Intrachurch Disputes: The Lesser of Two Constitutional Evils*, 11 ST. THOMAS L. REV. 109, 139 (1998) (concluding that deference is “the lesser of two constitutional evils”); Laycock, *supra* note 15, at 1373 (advocating for “church autonomy,” which he describes as “a constitutionally protected interest in [churches] managing their own institutions free of government interference”).

⁶⁰ Hamilton, *supra* note 13, at 1190 (stating that some courts have misread “the parameters of the Supreme Court’s Religion Clause Jurisprudence” in concluding that they “lack jurisdiction” over a broad swath of religious disputes).

⁶¹ See discussion *infra* Part II.A–B.

⁶² See, e.g., *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 12–13 (Tex. 2008) (barring recovery under tort law because the Religion Clauses of the First Amendment shielded ecclesiastical institutions from liability). Some cases also protect clergy from malpractice torts. See, e.g., *Schmidt v. Bishop*, 779 F. Supp. 321, 332 (S.D.N.Y. 1991) (holding that adjudicating the nature of sexual advances by clergy on minor was beyond purview of judiciary); *Langford v. Roman Catholic Diocese of Brooklyn*, 705 N.Y.S.2d 661, 662 (App. Div. 2000) (not evaluating conduct of priest who made sexual advances toward woman while counseling her that God can heal her multiple sclerosis because doing so would foster “excessive entanglement with religion”).

⁶³ See, e.g., *Van Osdol v. Vogt*, 908 P.2d 1122, 1126–28, 1133–34 (Colo. 1996) (en banc) (barring claim under the ministerial exception to Title VII); see also Joanne C. Brant, “*Our Shield Belongs to the Lord*”: *Religious Employers and a Constitutional Right to Discriminate*, 21 HASTINGS CONST. L.Q. 275, 276–77, 280–83 (1994); Laura L. Coon, Note, *Employment Discrimination by Religious Institutions: Limiting the Sanctuary of the Constitutional Ministerial Exception to Religion-Based Employment Decisions*, 54 VAND. L. REV. 481, 484–86 (2001).

matters of belief⁶⁴ (such as the divinity of Christ) but it quickly raises concerns when it is expanded to include religious practices that result in harm to others or in some manner violate the rights of another party.⁶⁵ These polar-opposite positions are well reflected in the exchanges between the Justices in some of the church property disputes. Writing in support of deference for the majority in *Serbian Eastern Orthodox Diocese v. Milivojevich*, Justice Brennan observed: “ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria. Constitutional concepts of due process, involving secular notions of ‘fundamental fairness’ or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance.”⁶⁶

The facility with which Justice Brennan strips church members of their legal rights is not lost on Justice Rehnquist, who, in his dissent warns against the judiciary’s “blind deference” to church hierarchy, thereby becoming “handmaidens of arbitrary lawlessness.”⁶⁷ Justice Rehnquist declares:

[s]uch blind deference, however, is counseled neither by logic nor by the First Amendment. To make available the coercive powers of civil courts to rubber-stamp ecclesiastical decisions of hierarchical religious associations, when such deference is not accorded similar acts of secular voluntary associations, would, in avoiding the free exercise problems petitioners envision, itself create far more serious problems under the Establishment Clause.⁶⁸

In addition to the issue of competency, proponents of deference also argue that their approach protects the separation of government and religion. Implicit in this argument is the notion that the secular sanctity (and thereby political viability) of our republic would somehow be threatened if civil courts intervened in religious disputes. The premise that permitting the judiciary a foray into religious disputes would somehow imperil our democracy merits two observations. First, as already discussed, the Supreme Court has sanctioned the use of the neutral-principles doctrine precisely to facilitate judicial intervention in most religious practice cases by using civil legal tools to avoid the charge

⁶⁴ See Hamilton, *supra* note 13, at 1190–91 (acknowledging that religious institutions have “complete dominion over belief,” but emphasizing that it is limited to “solely . . . ecclesiastical” issues (internal quotation marks omitted)).

⁶⁵ *Id.* at 1180 (calling for a constitutional approach that adheres to a “no-harm to third parties” rule).

⁶⁶ *Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich*, 426 U.S. 696, 714–15 (1976) (footnote omitted).

⁶⁷ *Id.* at 727, 734 (Rehnquist, J., dissenting).

⁶⁸ *Id.* at 734.

of entanglement or of “establishing churches.”⁶⁹ As Justice Rehnquist succinctly summarized, while “[t]here are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating intra-church disputes. . . . [the] Court never has suggested that those constraints similarly apply outside the context of such intraorganization disputes.”⁷⁰

Second, on a practical level, any alarm at the consequences of entanglement may, to some extent, be mitigated by the reality that courts have historically, on occasion, addressed religious questions in choice-of-law decisions, which are concerned with identifying which state’s or country’s laws apply at the time of dispute resolution. Religious choice-of-law questions often involve the judiciary in substantive examination of religious issues, with frequent use of experts to help a court decide between various religious standards and interpretations.⁷¹

Perhaps one may distinguish choice-of-law decisions on the basis that, unlike interpretations of the Torah and the Koran, examination of foreign laws does not run the risk of endorsing a particular view of religion because it can be achieved through the use of experts who practice in that system or scholars who study the particular country’s laws. This is a fair point and certainly will be relevant to any evaluation of the constitutionality of a government action under the endorsement test. It does not, however, detract from the comfort the choice-of-law decisions may provide by highlighting that the courts have an established tradition of addressing rules emanating from religious standards without raising concerns about excessively entangling the government with religion. Moreover, foreign choice of law questions involving religious standards often do oblige courts to select from amongst competing doctrinal interpretations, whereas in the *mahr* and *get* cases, courts would use experts merely to find an appropriate secular instrument with which to resolve the dispute. The bulk of the courts’ decisions could then turn on accepted secular principles of American jurisprudence.

⁶⁹ *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969) (internal quotation marks omitted).

⁷⁰ *Gen. Council on Fin. & Admin. of the United Methodist Church v. Superior Court of Cal.*, 439 U.S. 1355, 1372 (1978) (order denying application for stay pending review on cert.).

⁷¹ *See, e.g., Nat’l Grp. for Commc’ns & Computers Ltd. v. Lucent Techs. Int’l Inc.*, 331 F. Supp. 2d 290, 293, 301 (D.N.J. 2004) (investigating what Saudi law, which codifies and builds on the Shariah (Islamic Law), would call for to resolve the parties’ disagreement and rendering judgment based upon, among other things, its “review of . . . the testimony of the experts, . . . and the Court’s understanding of the fundamental principles of Islamic law as they would be interpreted by a court in Saudi Arabia”); *see also Bidas Corp. v. Unocal Corp.*, 16 S.W.3d 893, 898, 900–03 (Tex. App. 2000) (in resolving a tortious interference claim between the parties, crediting extensive expert trial testimony on Afghan Law under the Taliban, which followed a very conservative model of the Shariah).

I am not suggesting, therefore, that the choice-of-law decisions provide license for courts to use religious law to resolve disputes, but rather that they argue against an overtly strict interpretation of the deference approach, whereby courts must altogether abstain from hearing religious disputes. Indeed, Justice Blackmun's majority opinion in *Jones* unequivocally recognizes the state's "obvious and legitimate interest" in adjudicating religious disputes and the provision of "a civil forum" where such disputes can be resolved conclusively.⁷² Consequently, the important inquiry is not whether courts should intervene, but, exempting solely ecclesiastical issues of belief, the question is how that intervention should be conducted. To that end, the choice-of-law precedents not only reinforce recourse to the neutral-principles doctrine to resolve religious disputes, but also stand for the premise of interpreting the Court's guidelines in *Jones* broadly enough to allow courts to use resources (including expert testimony) to better identify appropriate secular tools that more closely resemble the religious rule undergirding the dispute.⁷³

Thus, the Supreme Court's guidelines governing the judiciary's ability to review disputes emanating out of religious agreements do not mandate complete deference in all matters to religious bodies, nor do they offer the lower courts the option to choose between the deference and neutral-principles-of-law approaches. Rather a more complete reading of the Court's analysis indicates that "religious institutions are properly subject to neutral principles of law,"⁷⁴ which the judiciary may interpret broadly when reviewing religious disputes. Before turning to the religious divorce cases, Part I.C briefly addresses the Supreme Court's guidance on the Free Exercise Clause.

C. Supreme Court Guidance on the Free Exercise Clause

In its landmark Free Exercise Clause decision, *Employment Division v. Smith*,⁷⁵ the Court held that religious objectors are not entitled to an automatic exemption from a "neutral law of general applicability," which does not intentionally discriminate on the basis of religion, but only incidentally burdens religion.⁷⁶ The Court went on to

⁷² *Jones v. Wolf*, 443 U.S. 595, 602 (1979). Blackmun's focus is to restrain civil courts from using "religious doctrine and practice" as the basis for deciding religious disputes. *Id.*

⁷³ This flexibility would prove particularly useful in the *mahr* decisions, enabling the courts to understand the true nature of a *mahr* provision so that they could analogize it to the most appropriate secular legal tool under the neutral-principles doctrine. See *infra* Part II.B.

⁷⁴ Hamilton, *supra* note 13, at 1134 (internal quotation marks omitted).

⁷⁵ *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

⁷⁶ *Id.* at 879, 890 (internal quotation marks omitted) (holding that the Free Exercise Clause did not protect the rights of Native Americans, fired for smoking peyote for sacramental

explain that such neutral laws are not required to pass the strict scrutiny standard of review, but may be evaluated under the rational relationship test.⁷⁷ The opinion created an immediate outcry and remains controversial to this day because it was deemed by many scholars to have overturned an established cornerstone of constitutional jurisprudence.⁷⁸ This unanimity of condemnation is surprising for two reasons. First, the Court's Free Exercise jurisprudence has followed a meandering path and was not set in stone in 1990, as many of *Smith's* detractors assume.⁷⁹ Second, when examined closely, *Smith's* holding is narrow and ring-fenced by an impressive list of qualifications.

Turning first to the issue of precedent, *Smith* echoes the Court's 1878 decision in *Reynolds v. United States*,⁸⁰ which addressed the Mormon Church's challenge to polygamy laws.⁸¹ In that decision, the Court held that religious objectors were not entitled to exemptions from generally applicable laws under the Free Exercise Clause.⁸² The Court went on to say that to recognize such exemptions "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."⁸³ "[U]nder such circumstances," the court concluded, the "[g]overnment could exist only in name."⁸⁴

Almost ninety years later, Free Exercise jurisprudence shifted when, in the 1963 decision *Sherbert v. Verner*,⁸⁵ the Court held that government actions that substantially burdened religious exercise were

purposes in violation of neutral state law prohibiting the use of drugs, to receive unemployment benefits).

⁷⁷ See Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555, 572 (1998) ("*Smith* merely requires that laws which incidentally burden religious conduct have a rational basis . . .").

⁷⁸ See, e.g., Angela C. Carmella, *Exemptions and the Establishment Clause*, 32 CARDOZO L. REV. 1731, 1731 (2011) (noting that the *Smith* decision "immediately provoked reaction (almost entirely negative) from the legal academy"); Daniel. O. Conkle, *Religious Truth, Pluralism, and Secularization: The Shaking Foundations of American Religious Liberty*, 32 CARDOZO L. REV. 1755, 1755 (2011) (declaring that *Smith* "dealt a blow to religious liberty"); Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 781 (1992) (expressing unhappiness with the Court's decision in *Smith*); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990).

⁷⁹ See, e.g., Gedicks, *supra* note 77, at 561–62 (arguing that, "[f]rom the standpoint of history, . . . *Sherbert* and *Yoder*, not *Smith*," are the "aberrations," with "the constitutional history of the Free Exercise Clause . . . almost completely against religious exemptions"); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 325 (1991) (arguing that while the text of the Free Exercise Clause "is consistent with protecting religion from discrimination; it does not compel discrimination in favor of religion").

⁸⁰ 98 U.S. 145 (1878).

⁸¹ See *id.* at 161–62.

⁸² *Id.* at 166–67.

⁸³ *Id.* at 167.

⁸⁴ *Id.*

⁸⁵ 374 U.S. 398 (1963).

required to pass strict scrutiny⁸⁶ and sincere religious objectors had a presumptive right to an exemption under certain circumstances even if the legislation did not provide for one.⁸⁷ Although, in theory, following *Sherbert*, the government had to demonstrate that a law was the least restrictive means of serving a compelling government interest, the Justices' dramatic shift towards accommodating religious objectors was somewhat ameliorated in practice because the Court's application of the strict scrutiny test in Religion Clauses jurisprudence was much more diluted than its use of the standard in race classifications and content-based speech restrictions.⁸⁸ As a result, the Court rejected most requests for exemption in its Free Exercise cases.⁸⁹ Thus, seen in this historical context, *Smith* is not an apocalyptic constitutional anomaly, but merely hails a return to established Free Exercise Clause jurisprudence as articulated in *Reynolds* (permitting exemptions to religious objectors only when legislation provides for one) after only a brief interlude when the Court entertained the constitutional exemption model set forth in *Sherbert*.

In addition to taking its cue from Supreme Court precedent, *Smith's* holding is fairly narrow and limited by a number of qualifications. As a result, the different approaches set out in *Smith* and *Sherbert* may reflect a mirage⁹⁰ since, in practice, the rational relationship test applied to government legislation in *Smith* is not very different from the weak strict scrutiny test applied to earlier religious practice cases under *Sherbert*.⁹¹ The majority in *Smith* alludes to this when it declares, “[w]e have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment

⁸⁶ Some scholars have criticized the use of strict scrutiny in the arena of religious jurisprudence. See, e.g., Hamilton, *supra* note 13, at 1103 (observing that strict scrutiny is usually applied when “the law bears indicia of unconstitutional purposes,” whereas in religious jurisprudence the standard is applied to “neutral, generally applicable laws . . . to place the religious entity in a position generally superior to the law”).

⁸⁷ *Sherbert*, 374 U.S. at 403–04 (holding that a member of the Seventh Day Adventist Church, whose religion prohibited her from working on Saturday, was entitled to unemployment compensation). The period between the *Reynolds* and *Sherbert* decisions is often referred to as the statutory exemption model, whereby religious objectors received an exemption only if the legislation provided for one. See VOLOKH, *supra* 21, at 339. The *Sherbert* holding created the constitutional exemption model, with sincere objectors potentially entitled to an exemption even when the statute does not provide for one, depending on how the law is evaluated under the strict scrutiny standard described above. See *id.* at 339–40.

⁸⁸ VOLOKH, *supra* note 21, at 369 (describing strict scrutiny for religious exemptions as “strict in theory, feeble in fact” (internal quotation marks omitted)).

⁸⁹ For an excellent overview of religion clauses jurisprudence, see generally *id.*

⁹⁰ Mark Tushnet, “Of Church and State and the Supreme Court”: *Kurland Revisited*, 1989 SUP. CT. REV. 373, 379 (rejecting that there is “a general doctrine of mandatory accommodation” pursuant to *Sherbert* and instead proposing that “*Sherbert* retains vitality only as a case about unemployment compensation”).

⁹¹ Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of Smith*, 102 NW. U. L. REV. 1189, 1193 (2008).

compensation.”⁹² First, *Smith*’s holding only applies to neutral laws of general applicability. In other words, while it may be a little harder under *Smith* for religious objectors to obtain an exemption to neutral laws because the government has to only demonstrate that the law passes constitutional muster under the rational relationship test, the decision leaves untouched laws that intentionally discriminate on the basis of religion, which must still be evaluated pursuant to the strict scrutiny test outlined in *Sherbert*.⁹³

Second, *Smith* does not change the law regarding government action that impedes religious belief as opposed to religious acts. The majority confirmed that, most importantly, “[t]he free exercise of religion means . . . the right to believe and profess whatever religious doctrine one desires,” but that the same blanket protection does not extend to religious conduct.⁹⁴ In other words, *Smith*, where applicable, restores the distinction made in earlier Supreme Court decisions preceding *Sherbert* (such as *Reynolds*) pursuant to which the First Amendment gives far greater protection to religious belief than to religious conduct. Third, the *Smith* decision leaves in place higher levels of protection for hybrid rights involving “the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech . . . or the right[s] of parents.”⁹⁵

Fourth, the decision gives legislatures full discretion to provide or deny religious exemptions to general secular statutes.⁹⁶ As such, the restrictions under *Smith* only apply to neutral laws where the legislature has chosen not to provide any exemptions to religious objectors. Finally,

⁹² *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 883 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (2012)).

⁹³ By implication, because *Smith*’s analysis pertains to a “neutral law of general applicability,” *id.* at 879 (internal quotation marks omitted), it leaves intentionally discriminatory laws subject to strict scrutiny. Subsequently, the Supreme Court reaffirmed the inapplicability of the *Smith* standard to intentionally discriminatory legislation. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546–47 (1993) (holding that while government may ban all killing of certain animals without any exemption for religious conduct, it is not permitted to ban solely the religious sacrifice of animals).

⁹⁴ *Smith*, 494 U.S. at 877.

⁹⁵ *Id.* at 881. For an example of hybrid rights upheld by *Smith*, see *Wisconsin v. Yoder*, 406 U.S. 205, 214–15 (1972) (using strict scrutiny, reversing Wisconsin’s decision not to exempt Amish parents from compliance with the Wisconsin Compulsory School Attendance Law as a violation of the parents’ First Amendment rights). Some supporters of *Smith* fault the majority for seemingly excluding “religious parenting cases” from the decision through its affirmation of the *Yoder* case. See, e.g., James G. Dwyer, *The Good, the Bad, and the Ugly of Employment Division v. Smith for Family Law*, 32 CARDOZO L. REV. 1781, 1786–87 (2011) (concluding that “the *Smith* Court effectively invited parents who want an exemption from any child welfare legislation to assert a ‘hybrid rights claim’”).

⁹⁶ *Smith*, 494 U.S. at 899; see also Kent Greenawalt, *Establishment Clause Limits on Free Exercise Accommodations*, 110 W. VA. L. REV. 343, 347 n.26 (2007); cf. Dwyer, *supra* note 95, at 1781 (criticizing *Smith*’s broad deference to legislative exemptions, which may result in too much deference to parents).

the *Smith* majority confirmed that religious and non-religious objectors may not be treated differently by declaring that “where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.”⁹⁷

When looked at comprehensively, *Smith*’s narrow holding limits exemptions to neutral laws, which do not intentionally discriminate either against religious practice or between religious and non-religious objectors, and at the same time do not negatively impact other constitutional protections. Seen from this perspective, *Smith* did not in any practical manner overrule *Sherbert*, but rather simply returned to the legislature the decision to exempt any particular privilege *Sherbert* may have required.

Despite the limitations inherent in the *Smith* decision, it generated enough shock waves to prompt Congress to pass the Religious Freedom Restoration Act (RFRA) of 1993⁹⁸ to legislatively reverse *Smith* and restore the standards under *Sherbert*’s constitutional exemption model.⁹⁹ In *City of Boerne v. Flores*,¹⁰⁰ however, the high court held that the RFRA exceeded congressional power regarding state law, but seemingly left the law in place as far as it impacts federal legislation.¹⁰¹ In the wake of *Boerne*, several states have passed RFRA’s requiring exemptions from state and local laws unless the state law can pass the strict scrutiny standard of review.¹⁰² A number of other state supreme courts have held that their state constitutions are required to follow the *Sherbert/Yoder* model, and some states remain undecided between *Sherbert/Yoder* or *Smith*. Thus, to fully decipher Free Exercise issues raised by courts’ adjudication of religious family disputes, Part II.A undertakes the inquiry pursuant to both the strict scrutiny and rational relationship standards of review. In states that have not passed an RFRA, and the government action is deemed neutral, the lower standard of review adopted in *Smith* will be applied to evaluate the constitutionality of the government action, while states that have passed an RFRA will undertake their analysis pursuant to the strict scrutiny standard outlined in *Sherbert*.

⁹⁷ *Smith*, 494 U.S. at 884 (citing *Bowen v. Roy*, 476 U.S. 693, 708 (1986)); see also Leslie C. Griffin, *Fighting the New Wars of Religion: The Need for a Tolerant First Amendment*, 62 ME. L. REV. 23, 44 (2010) (“The best way to avoid privileging a religious or philosophical reading of the Constitution is to hold all citizens to the same law, as *Smith* requires.”).

⁹⁸ Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (2012)).

⁹⁹ See VOLOKH, *supra* note 21, at 339–40.

¹⁰⁰ 521 U.S. 507 (1997).

¹⁰¹ See *id.* at 536.

¹⁰² See Hamilton, *supra* note 13, at 1104 & n.16; see also Gary S. Gildin, *A Blessing in Disguise: Protecting Minority Faiths Through State Religious Freedom Non-Restoration Acts*, 23 HARV. J.L. & PUB. POL’Y 411 (2000) (arguing in support of state RFRA’s).

II. JEWISH AND ISLAMIC DIVORCE CASES

This Part examines two sets of family law decisions to chart how lower courts have addressed potential conflicts between gender equality and religious liberty. Part II.A, which reviews *get* divorce cases, examines how lower courts have applied the Supreme Court's guidance on the justiciability of religious disputes, both to gauge whether the judiciary may review these disputes and also to determine whether remedies awarded in the *get* decisions, which typically entail an order of specific performance to grant a *get* or appear before the Beth Din, are constitutional.

Part II.B, which reviews a set of *mahr* decisions,¹⁰³ probes a little deeper into whether courts correctly apply the neutral-principles approach to meet the challenge set forth in *Jones* to adjudicate a religious dispute "in purely secular terms."¹⁰⁴ The majority in *Jones* obviously could not decree which secular terms should be used in a specific dispute, but logic dictates that the neutral principle selected should parallel the parameters of the religious provision in order to reflect the intent of the parties. The *mahr* decisions show that when lower courts do not understand the precise nature of a religious provision, they can sometimes reach for a secular tool that bears very little resemblance to the religious article. At a minimum, this results in a great deal of inconsistency in lower court decisions, and at its worst, in serious misinterpretation of the parties' contractual arrangement. This Article considers whether, to facilitate the selection of an appropriate secular legal tool to analogize to the *mahr*, courts should interpret *Jones* more broadly,¹⁰⁵ giving themselves access to additional resources, such as expert testimony to better understand the nature of the *mahr*. Of course, any broad reading of the judiciary's authority to review religious disputes must remain within the neutral-principles approach of *Jones* to prevent courts from making the mistake of basing their decisions on religious doctrines discussed by the experts.

A. *Get Divorce Cases*

Under certain branches of Judaism, a divorce is not final until the husband voluntarily gives a *get* to his wife, and she, in turn, accepts it.¹⁰⁶ Without a *get*, "the wife [becomes] an 'agunah' (a 'tied' woman)" and is

¹⁰³ The *mahr* is a gift to the bride for entering into the marriage contract. See BHALA, *supra* note 16, § 35.02[A]; see also Qur'an 4:4.

¹⁰⁴ *Jones v. Wolf*, 443 U.S. 595, 604 (1979).

¹⁰⁵ See *supra* text accompanying notes 72–73.

¹⁰⁶ See *Aflalo v. Aflalo*, 685 A.2d 523, 526–27 (N.J. Super. Ct. Ch. Div. 1996).

not allowed to marry again.¹⁰⁷ If she does marry, she and her children (referred to as *mamzerim*, “illegitimate”) are stigmatized for generations.¹⁰⁸ In many disputes, the husband may strategically refuse to grant a *get* to exact a better divorce settlement from the wife.¹⁰⁹

1. *Get* Divorce Cases and the Establishment Clause

In order to determine if the judiciary may resolve *get* disputes and evaluate the constitutionality of remedies awarded in those cases, it is helpful to divide the decisions into three overlapping categories. The first category encompasses cases where the parties have entered into express settlement agreements with explicit language that the husband will grant a *get* to the wife (or will appear before the Beth Din, a Rabbinical tribunal) at the time of a civil divorce.¹¹⁰ In the second group of cases, where the parties have not entered into an express agreement, the wife typically argues that the language in the *ketubah*, a traditional Jewish marriage contract, gives rise to an implied contractual obligation by the husband to execute a *get*.¹¹¹ In the third class of cases, the wife petitions the court to order the husband to abide by his agreement to

¹⁰⁷ *Id.* at 527.

¹⁰⁸ See *id.* (citing SHMUEL HIMELSTEIN, THE JEWISH PRIMER: QUESTIONS AND ANSWERS ON JEWISH FAITH AND CULTURE 161 (1990)).

¹⁰⁹ See, e.g., *Segal v. Segal*, 650 A.2d 996, 997–98 (N.J. Super. Ct. App. Div. 1994) (involving a husband who refused to grant a *get* unless the wife “waived any claim to child support or alimony, disclaimed any interest in all marital assets including [the husband’s] business, and in addition paid him \$25,000”); *Burns v. Burns*, 538 A.2d 438, 439 (N.J. Super. Ct. Ch. Div. 1987) (involving a husband who stated that he would secure the *get* for the defendant only if she agreed to “invest \$25,000 in an irrevocable trust for the benefit of their daughter, with the plaintiff and another party of his choosing as joint trustees”).

¹¹⁰ See, e.g., *Schwartz v. Schwartz*, 913 N.Y.S.2d 313 (App. Div. 2010) (finding husband in contempt of court for failing to obtain a *get* by the date he voluntarily agreed to in a written stipulation executed by the parties); *Waxstein v. Waxstein*, 395 N.Y.S.2d 877 (Sup. Ct. 1976) (“[G]rant[ing] specific performance of . . . separation agreement [provision] requiring the parties to obtain a ‘Get.’”), *aff’d*, 394 N.Y.S.2d 253 (App. Div. 1977); *Rubin v. Rubin*, 348 N.Y.S.2d 61 (Fam. Ct. 1973) (finding valid and enforceable a separation agreement that made payment of support and alimony conditional upon the wife obtaining a *get*).

¹¹¹ See, e.g., *Scholl v. Scholl*, 621 A.2d 808, 812 (Del. Fam. Ct. 1992); *In re Marriage of Goldman*, 554 N.E.2d 1016, 1022 (Ill. App. Ct. 1990) (finding that “the parties intended the *ketubah* to be a contract that the status and validity of their marriage would be governed by Orthodox Jewish law” and that “Orthodox Jewish law requires the husband to obtain and deliver to his wife an Orthodox *get* upon dissolution of the marriage”); *Minkin v. Minkin*, 434 A.2d 665, 666 (N.J. Super. Ct. Ch. Div. 1981) (“To compel the husband to secure a *get* would be to enforce the agreement of the marriage contract (*ketuba*).”); *Stern v. Stern*, 5 Fam. L. Rep. (BNA) 2810 (N.Y. Sup. Ct. Aug. 7, 1979). But compare *Aflalo*, 685 A.2d at 540–41, *Victor v. Victor*, 866 P.2d 899, 902 (Ariz. Ct. App. 1993), and *Mayer-Kolker v. Kolker*, 819 A.2d 17, 20–21 (N.J. Super. Ct. App. Div. 2003), for instances where the courts felt the particular *ketubah* was too vague to form the basis for an implied agreement by the husband to deliver a *get* to the wife.

resolve any dispute relating to Jewish law before the Beth Din, rather than specifically grant a *get*.¹¹²

When adjudicating disputes from the first category of cases, courts have shown a consistent willingness to grant the wife's equitable action for specific performance because the request flows from an express agreement between the parties. In general, in this first group of decisions, the courts do not dwell on the religious nature of the *get* but focus on using neutral principles of law to determine if the parties entered into a contract on the subject of the *get* and then award the remedy the parties outlined in their arrangement. For example, in *Waxstein v. Waxstein*, the parties executed a separation agreement as part of their divorce negotiation pursuant to which the husband agreed that "the parties shall obtain a Get from a duly constituted Rabbinical court."¹¹³ The court rejected the husband's argument that "the court may not enforce a contractual provision requiring a spouse to obtain a 'Get'" because it would "compel [him] to practice a[] religion."¹¹⁴ The court stated that it would be awarding the order of specific performance pursuant to the parties' own separation agreement, which addressed the

¹¹² See, e.g., *Avitzur v. Avitzur*, 446 N.E.2d 136 (N.Y. 1983) (enforcing parties' prenuptial agreement to appear before a Beth Din to arbitrate marital issues). A related issue, beyond the scope of this Article, involves the constitutionality of § 253 of the Domestic Relation Law, passed by the New York legislature in 1983 and popularly referred to as the "get statute," which makes a civil divorce contingent on the removal of all barriers to remarriage. See N.Y. DOM. REL. LAW § 253(3) (McKinney 2014). Section 253(3) states:

No final judgment of annulment or divorce shall thereafter be entered unless the plaintiff shall have filed and served a sworn statement: (i) that, to the best of his or her knowledge, he or she has, prior to the entry of such final judgment, taken all steps solely within his or her power to remove all barriers to the defendant's remarriage following the annulment or divorce; or (ii) that the defendant has waived in writing the requirements of this subdivision.

Id. The New York legislature took an additional step in 1992 and amended the state's equitable distribution statute empowering courts to take into account the impact "of a barrier to remarriage" when calculating equitable distribution in a marital dissolution. *Id.* §§ 236(B)(5)(h), (B)(5-a)(i), (B)(6)(d) (collectively with § 253, referred to as the "get statute"). Similarly, the United Kingdom, Canada, and South Africa, all with large Jewish populations, have enacted their own versions of a *get* statute. Jeremy Glicksman, Note, *Almost, but Not Quite: The Failure of New York's Get Statute*, 44 FAM. CT. REV. 300, 301 (2006). Also, "[i]n Israel, [where] Orthodox Jewish religious authorities have exclusive legal authority over marriage and divorce, providing a *get* is a condition precedent for remarriage and failure to do so can result in incarceration." *Id.*

¹¹³ *Waxstein*, 395 N.Y.S.2d at 880 (internal quotation marks omitted). The relevant section of the separation agreement stated that "[p]rior to the Wife vacating the premises as hereinbefore set forth, the parties shall obtain a Get from a duly constituted Rabbinical court." *Id.* (internal quotation marks omitted). The wife moved out by the agreed date, but the husband refused to give a *get*. He argued before the court that because she had moved out before he granted the *get*, he was no longer obligated to comply with the provision. The court rejected the argument and surmised that the husband could not be the cause of the wife not complying with the provision and then use that as his defense. *Id.*

¹¹⁴ *Id.*

issue of the *get*¹¹⁵ and noted that the validity of orders of specific performance to grant a *get* had already “been recognized in [New York].”¹¹⁶

Any disagreement in the lower court decisions in the first category of cases focuses on marginal issues, such as whether any additional consequences, including a term of imprisonment or a fine, should be imposed on the defaulting party. In *Kaplinsky v. Kaplinsky*,¹¹⁷ for example, the husband, who was party to a settlement agreement wherein he had voluntarily stipulated that he would “remove any and all barriers to the wife’s remarriage” at the time of divorce, refused to award a *get*.¹¹⁸ The New York Appellate Court upheld the lower court’s contempt and imprisonment orders, as well as the denial of all economic benefits, until the husband purged himself of the contempt.¹¹⁹ The court rejected the husband’s contention that the lower court’s hearing on the wife’s contempt application regarding the *get* violated statutory and constitutional standards because it dealt with a “religious issue.”¹²⁰ Instead, the court ruled that the lower court had “properly held the former husband in contempt of court for his failure to deliver [to] the former wife a *Get pursuant to the stipulation of settlement entered into by the parties in open court.*”¹²¹ A number of other decisions also reflect the *Waxstein-Kaplinsky* approach, upholding the parties’ arrangement that the husband will award a *get* at the time of divorce as memorialized in a written divorce or settlement agreement.¹²²

In the second category of cases, the lower courts are more divided when faced with the question of whether, in the absence of an express

¹¹⁵ *Id.* at 881.

¹¹⁶ *Id.* at 880.

¹¹⁷ 603 N.Y.S.2d 574 (App. Div. 1993).

¹¹⁸ *Id.* at 575 (internal quotation marks omitted).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* (emphasis added). The *Kaplinsky* decision builds on earlier holdings where the New York appellate courts upheld orders of specific performance to grant a *get*, but reversed orders of imprisonment for contempt of court. *See, e.g., Margulies v. Margulies*, 344 N.Y.S.2d 482 (App. Div. 1973). In *Margulies*, upon the husband’s continued refusal to honor the order to grant a *get*, the lower court first fined him and then sentenced him to fifteen days in jail. *Id.* at 484. The majority in *Margulies* used neutral principles of contract law to interpret the husband’s voluntary agreement to enter into an “open court stipulation” to grant a *get* and upheld the lower court’s order of specific performance, but reversed the imprisonment order, allowing him to purge himself of the contempt either by paying a fine or by granting the *get*. *Id.*

¹²² *See, e.g., Schwartz v. Schwartz*, 913 N.Y.S.2d 313, 316–17 (App. Div. 2010) (finding husband in contempt of court for failing to grant a *get* by the date he voluntarily agreed to in a written stipulation executed by the parties); *Fischer v. Fischer*, 655 N.Y.S.2d 630, 630–31 (App. Div. 1997) (holding husband in contempt because “his failure to . . . comply with the provisions of the divorce judgment regarding the procurement of a ‘get’ . . . was willful”). *But cf. Pal v. Pal*, 356 N.Y.S.2d 672, 672–73 (App. Div. 1974) (reversing an order allowing the court to choose a third rabbi in a Rabbinical court). The *Pal* court was apparently concerned that the lower court’s order would result in excessive entanglement in religion.

agreement, the general language of the *ketubah* gives rise to an implied contractual arrangement to give a *get* at the time of a civil divorce.¹²³ Typically, in the *ketubah*, the parties agree to be bound by “the laws of Moses and Israel,” and the question becomes whether “the laws of Moses and Israel” mandate the granting of a *get*.¹²⁴ Faced with this language, some courts opt for strict abstention on the grounds that any examination of a religious text is unconstitutional, while others attempt to use the neutral-principles-of-law approach to interpret the secular aspects of the *ketubah*. Decisions that do not find any Establishment Clause impediments hold that orders of specific performance to grant a *get* or appear before the Beth Din are constitutional under both the tripartite test in *Lemon* and the endorsement test.

Under the first prong of the *Lemon* test, some lower courts hold that an order of specific performance to grant a *get* may be deemed to have several secular purposes, including “enforcing a contract between the parties. . . . [,] promot[ing] the amicable settlement of disputes . . . [,] and] mitigat[ing] the potential harm to the spouses and their children caused by the process of legal dissolution of marriage.”¹²⁵ Since the Supreme Court has not, to date, evaluated a dispute emanating out of a religious divorce, one cannot declare with certainty what it would deem a permissible secular purpose in the *get* cases. Still, the Court’s past decisions may provide some insight into how it may evaluate an order of specific performance to grant a *get* under the first prong of the *Lemon* test. To this end, the Supreme Court has stated that it would accept a state’s declaration of a secular purpose as long as it is “sincere and not a sham.”¹²⁶ The Court has even noted that government action that directly benefits religious institutions (such as state funding of tuition vouchers, flowing largely to religiously affiliated schools) has a secular purpose.¹²⁷

¹²³ See, e.g., *Scholl v. Scholl*, 621 A.2d 808 (Del. Fam. Ct. 1992); *Minkin v. Minkin*, 434 A.2d 665 (N.J. Super. Ct. Ch. Div. 1981); *Stern v. Stern*, 5 Fam. L. Rep. (BNA) 2810 (N.Y. Sup. Ct. Aug. 7, 1979).

¹²⁴ See *In re Marriage of Goldman*, 554 N.E.2d 1016, 1020 (Ill. App. Ct. 1990); *Aflalo v. Aflalo*, 685 A.2d 523, 529–31 & n.10 (N.J. Super. Ct. Ch. Div. 1996).

¹²⁵ See, e.g., *Goldman*, 554 N.E.2d at 1023 (internal quotation marks omitted); see also *Minkin*, 434 A.2d at 668 (holding that an order had “the clear secular purpose of completing a dissolution of the marriage”). A number of other courts have also held that the words “according to the law of Moses and Israel” in the *ketubah* create an implied contractual obligation to grant and receive a *get* or to appear before the Beth Din. See, e.g., *Scholl*, 621 A.2d at 810, 812 (using “neutral principles of law” to order the “[h]usband to do what he already promised” and “to obtain an Orthodox [*get*]” (internal quotation marks omitted)); *Schneider v. Schneider*, 945 N.E.2d 650 (Ill. App. Ct. 2011) (granting wife’s petition for specific performance for the husband to give a *get* pursuant to the terms of the *ketubah* the parties signed as part of their marriage ceremony); *Burns v. Burns*, 538 A.2d 438 (N.J. Super. Ct. Ch. Div. 1987) (ordering husband to appear before the Beth Din or in the alternative authorize a proxy to grant *get* to the wife).

¹²⁶ *Edwards v. Aguillard*, 482 U.S. 578, 587 (1987).

¹²⁷ See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (holding that government funding of tuition voucher programs constitutes permissible secular purpose even when ninety-

In comparison, it seems plausible that courts' use of neutral principles of law to interpret the secular parts of a *ketubah* will be deemed to serve a less religious purpose than funding voucher programs that profit sectarian schools. As a result, it is possible the Supreme Court may accept that the courts' sole and sincere goal is to resolve the claimants' dispute rather than a sinister agenda to benefit or discredit a particular religion.¹²⁸

As part of their examination of the second prong of the *Lemon* test, some lower courts reason that an order of specific performance to grant a *get* "neither advances nor inhibits religion,"¹²⁹ but rather, its "principal or primary effect" is to further the secular purposes stated above.¹³⁰ Again, because the Supreme Court has not ruled directly on *get* cases, it is impossible to be certain whether it would classify an order of specific performance as a type of government action that advances or inhibits religion. Past examples of "impermissible primary effect[]" include "[p]referential financial benefits for religion,"¹³¹ while "[b]enefit[s] flowing to religious speakers" in order to give them the "same access to government property as is given to other speakers" constitutes a permissible primary effect.¹³² In *Texas Monthly, Inc. v. Bullock*, the Court struck down as an impermissible primary effect, preferential sales tax exemptions for religious magazines,¹³³ but, six years later, upheld, in

six percent of the funds flow to religiously affiliated schools). On the other hand, any government action that endorses religion is deemed to have an impermissible religious purpose. See discussion *supra* text accompanying notes 31–35 (discussing the Supreme Court's ruling in *Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989)).

¹²⁸ It has also been suggested that another secular purpose may include the avoidance of the intentional infliction of emotional distress, since the deliberate withholding of a *get*, with full knowledge of its implications, may cause extreme anguish. Irving Breitowitz, *The Plight of the Agunah: A Study in Halacha, Contract, and the First Amendment*, 51 MD. L. REV. 312, 386, 399–400, 402 (1992). Breitowitz also proposes that women in this position may have a claim that without a *get* they are denied the Free Exercise of their religion. In other words, by facilitating the granting of a *get* "the state is merely accommodating the practice of religion by removing its disadvantages, rather than establishing it in a preferred position." *Id.* at 385. In this way, judicial orders of specific performance to grant a *get* may be deemed to serve an anti-discrimination purpose because, without a *get*, marriages among Orthodox and Conservative Jews that have been declared civilly terminated could be perpetuated indefinitely, leaving traditional Jewish women disadvantaged in comparison to other American women. See *id.*

¹²⁹ Under the second prong of the *Lemon* test, the "principle or primary effect" of a government action "must be one that neither advances nor inhibits religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968)).

¹³⁰ See, e.g., *In re Marriage of Goldman*, 554 N.E.2d 1016, 1019, 1022 (Ill. App. Ct. 1990); see also *Minkin v. Minkin*, 434 A.2d 665, 668 (N.J. Super. Ct. Ch. Div. 1981) (holding that an order of specific performance did not advance religion or cause "excessive entanglement with religion").

¹³¹ VOLOKH, *supra* note 21, at 5 (emphasis omitted) (citing *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989)).

¹³² *Id.* at 4–5 (citing *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) and *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995)).

¹³³ *Texas Monthly*, 489 U.S. at 14–15; see also VOLOKH, *supra* note 21, at 4–5.

Rosenberger v. Rector & Visitors of University of Virginia, the constitutionality of providing funds to permit religious speech a voice in a public forum, so long as the venue was equally open to non-religious and anti-religious speech.¹³⁴ Unlike the provision of preferential tax exemption to religious magazines, which clearly favors, and therefore advances, the financial welfare of the beneficiary religious institutions, awarding an order of specific performance to grant a *get* or to appear before the Beth Din does not advantage Judaism, but instead has the primary effect of supporting a host of secular goals outlined above. On the other hand, the tone of the *Rosenberger* decision (even though adjudication of *get* disputes does not touch directly on religious speech) suggests that the justices may be receptive to giving litigants the same access to one of our most public forums, the civil courts, irrespective of whether their disputes emanate out of a religious agreement or a secular arrangement.

The third prong of the *Lemon* test prohibits only “excessive government entanglement with religion,” but does not call “for total separation between church and state.”¹³⁵ In *Agostini v. Felton*,¹³⁶ the Court reaffirmed this perspective by noting that “[n]ot all entanglements . . . [between church and state] have the effect of advancing or inhibiting religion. . . . Entanglement must be ‘excessive’ before it runs afoul of the Establishment Clause.”¹³⁷ Many of the lower court decisions focus on this prong of the *Lemon* test and hold that awarding an order of specific performance to grant a *get* does not result in excessive entanglement with religion, because, pursuant to the mandate in *Jones*, the court can resolve the dispute using neutral, “well-established principles of contract law to enforce the agreement made by the parties.”¹³⁸

Once again, since the Supreme Court has not directly addressed a *get* dispute, one can only extrapolate from its other Religion Clauses cases whether it would view the granting of an order of specific performance to give a *get* or appear before the Beth Din as excessively entangling the government in religious affairs. Generally, based on the standards articulated in *Lemon*, *Agostini*, and other related decisions, excessive entanglement occurs when there is a need for ongoing state supervision of religious programs or if the state meddles in purely

¹³⁴ *Rosenberger*, 515 U.S. at 840–43.

¹³⁵ *Lemon v. Kurtzman*, 403 U.S. 602, 613–14 (1971) (internal quotation marks omitted) (first quote quoting *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 674 (1970)).

¹³⁶ 521 U.S. 203 (1997).

¹³⁷ *Id.* at 233.

¹³⁸ *In re Marriage of Goldman*, 554 N.E.2d 1016, 1023 (Ill. App. Ct. 1990). The court also emphasized that the order was limited “to avoid interference with religious doctrine.” *Id.* The order specified four options for the husband, including giving the *get*, cooperating with a Beth Din, or authorizing a proxy to give the *get*. *Id.* at 1021.

doctrinal matters. For example, the Court has held that provision of remedial education, guidance, and job counseling services by public school employees to low-income students attending qualified private religious elementary or secondary school does not constitute excessive entanglement.¹³⁹ On the other hand, the Court has found excessive entanglement when the government supervises religious institutions and programs too closely¹⁴⁰ or when it discriminates amongst denominations.¹⁴¹ Since, in most of the *get* disputes, the court awards only a single order of specific performance without assigning itself any continuing surveillance duties, usually there is no need for ongoing state supervision. Were a court, however, to take an active role in establishing the Beth Din or directing the form of the *get* document, it would surely raise Establishment Clause alarm bells.¹⁴²

Nevertheless, lower court decisions that rely on the general language of the *ketubah* to find an implied contractual agreement to give a *get* do risk enmeshing the courts in a doctrinal analysis and thereby face a challenge under the third prong of the *Lemon* test. While the neutral-principles approach may allow courts to find the basic elements of a contract in these cases, it is not always evident how the courts can decipher what the parties agreed to in that contract without some exploration of what “the laws of Moses and Israel” have to say regarding the granting of a *get*. In other words, a court may not be able to use “purely secular terms,” as *Jones* requires, to examine what many would view as disputed questions of religious doctrine, namely whether pursuant to “the laws of Moses and Israel” a husband may be forced to grant a *get* to his wife. As a testament to this difficulty, courts looking to grant the wife’s request for an order of specific performance based on the language in the *ketubah* often base the core of their analysis on expert testimony by rabbis.¹⁴³

As a result, some lower courts take the view that the judiciary is prohibited by the Religion Clauses from interfering in *get* disputes that rely on the general interpretation of the *ketubah*.¹⁴⁴ From this

¹³⁹ *Agostini*, 521 U.S. at 234–35.

¹⁴⁰ See, e.g., *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989).

¹⁴¹ See, e.g., *Larson v. Valente*, 456 U.S. 228 (1982).

¹⁴² See, e.g., *Pal v. Pal*, 356 N.Y.S.2d 672, 673 (App. Div. 1974) (reversing order allowing the court to choose a third rabbi in a Rabbinical court). The *Pal* court was apparently concerned that the lower court’s order would result in excessive entanglement in religion.

¹⁴³ In both the *Goldman* and *Minkin* decisions, for example, Rabbis testified that the *get* procedure is “secular rather than religious in nature” because it does not require the husband to profess any religious belief and a Rabbi is not needed to preside over it. See *Goldman*, 554 N.E.2d at 1020; accord *Minkin v. Minkin*, 434 A.2d 665, 667–68 (N.J. Super. Ct. Ch. Div. 1981). The courts then used this testimony to propose that resolving a dispute centered around a *get*, which is secular, neither advances religion nor causes excessive entanglement between church and state. See *Goldman*, 554 N.E.2d at 1023; *Minkin*, 434 A.2d at 668.

¹⁴⁴ E.g., *Aflalo v. Aflalo*, 685 A.2d 523, 528, 531 (N.J. Super. Ct. Ch. Div. 1996) (holding that it was prohibited by the “Establishment . . . [and] [t]he Free Exercise Clause[s] . . . from

perspective, deciding what “the laws of Moses and Israel” requires is a quintessential example of something that *cannot* be determined by reference to “neutral principles,” because it requires the resolution of a contested religious question.¹⁴⁵ Ironically, however, the set of decisions that seek to recuse the judiciary from adjudicating religious disputes may risk becoming even more entangled in theological analysis by trying to establish the religious underpinning of a *get*.¹⁴⁶ The Supreme Court warned against this in *Jones* and suggested that “a rule of compulsory deference” to religious institutions may cause even greater entanglement than the application of neutral principles of law.¹⁴⁷

The issue in most of the first and second category cases is whether the courts are constitutionally empowered to interpret the *ketubah*, or the parties’ express agreement related to the *ketubah*, to order the husband to grant a *get* or cooperate with the Beth Din. In general, these decisions do not confront directly the question of deference to religious tribunals (in this case the Beth Din). The third category of cases, led by the landmark decision *Avitzur v. Avitzur*, does precisely that and asks whether the parties’ agreement embodied in the *ketubah* to submit all controversies between husband and wife regarding “the standards of the Jewish law of marriage” to the Beth Din is enforceable.¹⁴⁸

The *Avitzur* majority first acknowledges that the judiciary may not consider disagreements centered purely on religious belief, but goes on to recognize that, under *Jones v. Wolf*, courts may use the “neutral principles of law” approach to resolve “religious disputes which do[] not entail consideration of doctrinal matters.”¹⁴⁹ Next, the opinion notes that, when crafting a remedy, the mere fact “that the obligations undertaken by the parties . . . are grounded in religious belief and practice does not preclude enforcement of [the *ketubah*’s] secular

interfering” in the dispute and reflecting that the wife’s predicament comes from her “own sincerely-held religious beliefs” when “she agreed to be obligated to the laws of Moses and Israel” and “can hardly be remedied by [the] court”).

¹⁴⁵ See *Victor v. Victor*, 866 P.2d 899, 900 (Ariz. Ct. App. 1993) (holding that “it is without jurisdiction to order the respondent to grant an [O]rthodox ‘Get’”); *Mayer-Kolker v. Kolker*, 819 A.2d 17, 18–19 (N.J. Super. Ct. App. Div. 2003) (noting that the trial judge lamented that although he would have liked to grant the request for an order of specific performance, following *Aflalo*, he did not believe that he had “the authority to do that” (internal quotation marks omitted)).

¹⁴⁶ See, e.g., *Aflalo*, 685 A.2d at 526–27, 529 & n.10, 530 (quoting repeatedly from 6 ENCYCLOPEDIA JUDAICA 131 (1971) and *Deuteronomy* 24:1–4 to define a *get*, clarify the process involved in granting a *get*, and explain the implications for the wife if the husband refuses to give a *get*). The court also seems to engage in ideological observations by declaring that the wife’s “religion, at least in terms of divorce, does not profess gender equality.” *Id.* at 535.

¹⁴⁷ *Jones v. Wolf*, 443 U.S. 595, 605 (1979).

¹⁴⁸ *Avitzur v. Avitzur*, 446 N.E.2d 136 (N.Y. 1983); see also *Berg v. Berg*, No. 25099/05, 2008 WL 4155652, at *3 (N.Y. Sup. Ct. Sept. 8, 2008) (holding that “it is well established that the court can enforce an agreement in which [the] parties agree to refer a divorce matter to a Beth Din”), *aff’d as modified*, 926 N.Y.S.2d 568 (App. Div. 2011).

¹⁴⁹ *Avitzur*, 446 N.E.2d at 138 (internal quotation marks omitted).

terms.”¹⁵⁰ To that end, the *Avitzur* majority found that the parties’ contract to submit their marital dispute to a Beth Din constituted a secular arbitration agreement, which the court was empowered to adjudicate under *Jones*.¹⁵¹ The court reasoned that it avoided “excessive entanglement between church and State” by relying on “neutral principles of contract law, without reference to any religious principle,” to award the wife’s request for specific performance to submit to the jurisdiction of the Beth Din.¹⁵² The majority also repeatedly pointed out that it was not ordering the husband to award a *get*, but merely enforcing the parties’ contractual agreement to submit to religious arbitration.¹⁵³ In light of all the shortcomings of the second category of decisions and their tendency to risk lapsing into doctrinal analysis, *Avitzur* may reflect a more tenable approach to reviewing religious disputes.

As stated earlier, in some of its religion clauses decisions, the Supreme Court has largely ignored the three-pronged *Lemon* test and relied on the endorsement test, which asks whether a reasonable observer would conclude that a state action endorses (or disapproves) or merely accommodates religion. Thus, within the context of the *get* cases, the appropriate inquiry under the endorsement test is whether a reasonable observer would view awards of orders of specific performance as either an endorsement of Judaism, because it favors Orthodox and Conservative Jewish women, or a condemnation of Judaism, by sending the message that the husband’s power to withhold divorce is unjust. As described earlier, the Supreme Court, in *Allegheny* and *Lynch*, emphasized the importance of “context” in Establishment Clause analysis and concluded that an objective observer would not view a display of the crèche as an endorsement of religion if it were presented alongside other secular items.¹⁵⁴ Given that the crèche, which communicates one of the central messages of Christianity, “that God sent His son into the world to be a Messiah,”¹⁵⁵ may be deemed secular, it is not far-fetched to suggest that the Court will also uphold the non-

¹⁵⁰ *Id.* at 139.

¹⁵¹ *Id.* at 138. The court also rejected the husband’s argument that the *ketubah* was unenforceable because it was entered into as part of a religious ceremony, noting that the state has always recognized solemnization of marriages by religious officials. *Id.* at 138–39.

¹⁵² *Id.* at 138.

¹⁵³ See, e.g., *id.* (“[P]laintiff is not attempting to compel defendant to obtain a *Get* or to enforce a religious practice arising solely out of principles of religious law. She merely seeks to enforce an agreement made by defendant to appear before and accept the decision of a designated tribunal.”).

¹⁵⁴ See *Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 595–97 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 679–80 (1984).

¹⁵⁵ *Lynch*, 465 U.S. at 711 (Brennan, J., dissenting) (suggesting that the crèche’s embodiment of “one of the central elements of Christian dogma,” is not neutralized by the presence of secular figures such as “Santa Claus, reindeer, and carolers”).

sectarian act of awarding orders of specific performance in *get* cases, as it can be justified on several secular bases. Instead of viewing the judiciary's actions in *get* cases as either endorsing or condemning religion, a reasonable observer may consider orders of specific performance as remedies crafted based on the parties' own agreement to (1) support general standards of gender equality in family law, (2) uphold the freedom of contract and encourage settlement of disputes in divorce cases, and (3) level the playing field for Orthodox and Conservative Jewish women (regarding their right to remarry). Furthermore, because, as part of its guidance on the Establishment Clause, the Supreme Court has stated that the judiciary must treat believers and non-believers equally,¹⁵⁶ courts may in fact *fail* the endorsement test if they *close* their doors to litigants who are party to a religious agreement, because they would be excluding believers from a very important public forum.

The Supreme Court's overall guidance on the Establishment Clause does not, by in large, counsel abstinence from the neutral interpretation of contracts, even if the contracts address religious disputes. Consequently, a broad range of remedies awarded in religious family law cases may be deemed constitutional, although courts should be more disciplined and rely solely on neutral principles of law in crafting their decisions. Understandably, courts are most comfortable with adjudicating these cases if the parties' agreement is encapsulated in an express settlement contract or if the agreement between the parties involves a commitment to appear before the Beth Din rather than specifically to grant a *get*. Perhaps, inevitably, courts betray the greatest anguish when resolving the second category of cases where the parties' understanding regarding a *get* must be implied from the language of the *ketubah* rather than a separate settlement agreement. When confronted with this dilemma, some courts abstain from adjudicating *get* disputes in order to avoid entanglement in doctrinal analysis under "the laws of Moses and Israel," while others attempt to apply the neutral-principles-of-law approach to interpret the secular parts of the *ketubah* in order to find an implied obligation for the husband to grant a *get* to the wife.

2. *Get* Divorce Cases and the Free Exercise Clause

Concurrent with an Establishment Clause defense, husbands in *get* disputes often also assert that judicial orders of specific performance violate their rights to freely exercise their religion. Generally, the

¹⁵⁶ *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (concluding that the Establishment Clause "requires the state to be a neutral in its relations with groups of religious believers and non-believers").

defendant husband argues that because, under Jewish law, the *get* has to be granted voluntarily, an order of specific performance interferes with his prerogative to choose to give or withhold a *get*.¹⁵⁷ A few husbands make the opposite argument, positing that, as liberal Jews they should not be forced to practice the tenants of Orthodox Judaism, which they find “discriminatory” and “antimodern.”¹⁵⁸

Free Exercise challenges in religious family law disputes could potentially be evaluated under either the standard set forth in *Smith* or *Sherbert*'s tepid strict scrutiny standard. As outlined above, in *Smith*, the Supreme Court held that for the purposes of Free Exercise analysis, religious objectors are not entitled to an automatic exemption from a “neutral law of general applicability,” which does not intentionally discriminate on the basis of religion, but only incidentally burdens religion.¹⁵⁹ The Court went on to explain that such neutral laws are not required to pass the strict scrutiny standard of review, but may be evaluated under the rational relationship test.¹⁶⁰ On the other hand, if judicial remedies in religious divorce cases are not characterized as neutral and instead are deemed to intentionally discriminate on the basis of religion, they must pass the strict scrutiny test outlined in *Sherbert*.

Smith's detractors may object that its holding has no bearing on *get* disputes because *Smith* is limited to disputes involving government legislation, not contractual arrangements between private parties. In fact, however, courts have applied *Smith* to disputes emanating out of private contractual arrangements to protect state priorities, such as the state's interest in the general economic order.¹⁶¹ Other objectors may

¹⁵⁷ See, e.g., *Minkin v. Minkin*, 434 A.2d 665, 666 (N.J. Super. Ct. Ch. Div. 1981); see also *Aflalo v. Aflalo*, 685 A.2d 523, 534 (N.J. Super. Ct. Ch. Div. 1996) (refusing to order husband to give wife a *get* under the First Amendment).

¹⁵⁸ See, e.g., *In re Marriage of Goldman*, 554 N.E.2d 1016, 1023 (Ill. App. Ct. 1990).

¹⁵⁹ *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)) (internal quotation marks omitted), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (2012)).

¹⁶⁰ See *Gedicks*, *supra* note 77, at 572 (“*Smith* merely requires that laws which incidentally burden religious conduct have a rational basis . . .”).

¹⁶¹ See, e.g., *S. Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch.*, 696 A.2d 709 (N.J. 1997). In *South Jersey*, over the objections of the church, teachers in a parochial school sued for the right to unionize pursuant to the constitution of the State of New Jersey, which provided for collective bargaining rights of private employees. *Id.* at 713. The court noted that under *Smith* the state no longer had to show a compelling state interest if a neutral program only incidentally burdened a religious practice and affirmed the lower court's ruling that organizing a union that limited its agenda to secular terms and conditions did not violate the church's free exercise rights. *Id.* at 719, 724. Other cases, without using *Smith*, have nonetheless held that limits must be placed on the shield the Free Exercise Clause can provide against discriminatory behavior. For example, in *McKelvey v. Pierce*, 800 A.2d 840 (N.J. 2002), the court held that courts should be able to hear claims based on “breach of contract (implied in fact and law) . . . ; a breach of covenant of good faith and fair dealing; a

declare that *get* disputes are simply not concerned with a “neutral law of general applicability.” While it is true that most of the *get* decisions do not deal with direct violations of legislation, it is possible to characterize states’ regimes of family law as a set of neutral laws of general applicability. In this context, the important question is whether the judiciary’s abstinence from reviewing Jewish divorce cases, which would result in rubber-stamping the husband’s refusal to grant a *get*, is the equivalent to giving him a religious exemption to civil family law. It is possible to draw this conclusion because accommodating the husband’s refusal to grant a *get* potentially reinserts discriminatory standards into the balanced framework of divorce law, often giving recalcitrant partners a bargaining chip for negotiating better terms as part of their overall divorce settlement.¹⁶² On the other hand, awarding the order of specific performance simply maintains a neutral family law regime and disarms any negotiating advantage the husband may have. Just as in *Smith*, where the Supreme Court held that Free Exercise rights may not be used as a shield against otherwise criminal activity,¹⁶³ the Religion Clauses should not be deployed to cloak otherwise sexist behavior.

Denying a husband’s automatic exemption from gender-neutral family law standards also dovetails with the Supreme Court’s guidance in *Jones* on the Free Exercise defense. The *Jones* majority rejected the argument that “[t]he neutral-principles approach . . . [would] ‘inhibit’ the free exercise of religion,” and instead emphasized that “the neutral principles approach,” had the required “flexibility . . . to reflect the intentions of the parties.”¹⁶⁴ The Court in *Jones* noted that church members could at any time modify deeds to express how church property ownership would be allocated such that the courts’ application of neutral principles would inevitably result in outcomes that reflected the parties’ wishes.¹⁶⁵ Similarly, in crafting orders of specific performance in *get* cases, courts use neutral principles of contract law to decipher the parties’ intent from their own contractual arrangement, “[c]ompelling a party to do nothing more than what that party has already promised,” which, as one scholar noted, “hardly offends the spirit of individual autonomy that lies at the root of the First Amendment.”¹⁶⁶

breach of fiduciary duty; intentional infliction of emotional distress; and fraud and deceit.” *Id.* at 858.

¹⁶² See *Burns v. Burns*, 538 A.2d 438, 439 (N.J. Super. Ct. Ch. Div. 1987) (involving husband who refused to grant wife *get* unless she agreed to “invest \$25,000 in an irrevocable trust for the benefit of their daughter, with the plaintiff and another party of his choosing as joint trustees”).

¹⁶³ *Smith*, 494 U.S. at 890.

¹⁶⁴ *Jones v. Wolf*, 443 U.S. 595, 603, 606 (1979).

¹⁶⁵ *Id.* at 606.

¹⁶⁶ See Breitowitz, *supra* note 128, at 357.

Smith is not applicable, however, in jurisdictions that have passed state RFRA or adopted the *Sherbert/Yoder* state constitutional models. As such, an order of specific performance would have to pass the strict scrutiny test outlined in *Sherbert*, pursuant to which the party objecting to the awarding of the remedy must first establish that the order constitutes a substantial burden on his religious belief, shifting the burden of proof to the other party, who must then demonstrate that an order of specific performance is the least restrictive means of achieving a compelling governmental interest. As noted earlier, the strict scrutiny test applied in Religion Clauses jurisprudence is a much weaker version of the same test applied in equal protection- or speech-based analysis.¹⁶⁷ As part of its Free Exercise Clause jurisprudence, the Supreme Court has found a range of objectives, such as “maintaining a sound tax system” free of religious exceptions¹⁶⁸ and “eradicating racial discrimination in education,”¹⁶⁹ to constitute compelling government goals. Extrapolating from these earlier decisions, it does not seem implausible to suggest that, preventing gender discrimination in divorce law and preserving a fair family law regime (including protecting the right to marry or remarry, which the Supreme Court has categorized as a fundamental right¹⁷⁰) would constitute compelling goals, especially under the lower strict-scrutiny standard applied in religion cases. In addition to sustaining the non-discriminatory framework of family law, other compelling goals, which may be served by upholding orders of specific performance, include maintaining the judiciary’s ability to adjudicate religious disputes using neutral principles of contract law, thereby giving believers and non-believers equal access to the courts, and restraining criminal behavior, such as extortion, amongst the divorcing parties.

Finally, granting an order of specific performance in *get* cases is the least restrictive means of achieving the above compelling goals. Unlike *Sherbert*, where the Court held that the risk of fraudulent claimants “feigning religious objections to Saturday work” would not “dilute the unemployment compensation fund,”¹⁷¹ hampering the judiciary’s ability to oversee religious disputes using neutral principles of law would certainly tarnish the state’s “obvious and legitimate interest”¹⁷² in

¹⁶⁷ VOLOKH, *supra* note 21, at 369 (describing strict scrutiny in religion cases as “strict in theory, feeble in fact” (internal quotation marks omitted)).

¹⁶⁸ *Hernandez v. Comm’r*, 490 U.S. 680, 699–700 (1989) (internal quotation marks omitted).

¹⁶⁹ *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983).

¹⁷⁰ *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down a miscegenation statute that violated the fundamental right to marry).

¹⁷¹ *Sherbert v. Verner*, 374 U.S. 398, 407 (1963).

¹⁷² *Jones v. Wolf*, 443 U.S. 595, 602 (1979).

adjudicating these disagreements and would deny parties to Jewish marriage contracts a “civil forum”¹⁷³ for resolving their dispute.¹⁷⁴

On balance, it appears that challenges to judicial orders of specific performance pursuant to the Free Exercise Clause stand on a weak leg under both *Smith* and *Sherbert*. Furthermore, enforcing absolute religious liberty, in disregard of *Smith* and *Sherbert*, would mean that “harm to women yields to religious freedom without judicial review.”¹⁷⁵ Conversely, permitting judicial intervention in religious disputes using neutral legal tools preserves the jurisdiction of the courts and affords an impartial civil forum where litigants can resolve their disputes based on non-discriminatory standards. Often times, this approach more appropriately reflects the parties’ own contractual arrangement while at the same time maintaining the standards of gender equality that frame modern family law.

B. *Islamic Divorce and Mahr Provisions*

Another area of family law disputes where courts have struggled to honor private religious agreements within the boundaries of Religion Clauses jurisprudence, without forfeiting legal safeguards against gender discrimination, involves *mahr* provisions in Islamic marriage contracts. The Qur’an defines the *mahr* as a gift to the bride for entering into the marriage contract.¹⁷⁶ In the English translation of the portion of the marriage ceremony that relates to the *mahr*, the woman states “I give myself to you in marriage for the marriage gift which is ‘x,’” and “[i]n place of ‘x,’” the parties enter the amount of the agreed-upon *mahr*.¹⁷⁷ Much like the *get* decisions, the *mahr* cases also raise concerns about whether their adjudication excessively entangles the judiciary with religion or impermissibly interferes with the litigants’ rights to freely practice their religion. However, because, with minor nuances, the analysis regarding these broad issues are the same as those already addressed in the *get* decisions, this Part narrows its lens further and focuses on whether courts meet *Jones*’s challenge of finding a suitable secular tool that closely parallels the religious provision underpinning the agreement to use as the basis for resolving the dispute on civil

¹⁷³ *Id.*

¹⁷⁴ Also, since many Jewish husbands grant *gittin* (Jewish divorces) without considering themselves in violation of religious law, it is unlikely that the requirement to grant a *get* would be deemed a substantial burden on the husband’s religious beliefs.

¹⁷⁵ Griffin, *supra* note 5, at 1834.

¹⁷⁶ See Qur’an 4:4; see also BHALA, *supra* note 16, § 35.02[A].

¹⁷⁷ ABDUL HADI AL-HAKIM, A CODE OF PRACTICE FOR MUSLIMS IN THE WEST 170 (Najim al-Khafaji ed., Sayyid Muhammad Rizvi trans., 2001) (This book is based on the expert opinions of Grand Ayatollah al-Sayyid ‘Ali al-Husayni al-Sistani, one of the most revered leaders of Shia Islam.).

grounds. The *mahr* decisions show that when lower courts do not understand the precise nature of a religious provision, they often choose a secular tool that bears very little resemblance to the religious article, handicapping the judiciary's ability to reach a holding that reflects the parties' intent.

Some scholars have suggested that *Jones* is too vague to help courts identify specifically which "purely secular terms"¹⁷⁸ should be used in each instance of resolving a religious dispute, thereby limiting its predictability value.¹⁷⁹ Consequently, they reason, courts end up employing too wide a variety of, often inappropriate, secular tools to resolve strikingly similar disputes causing confusion and uncertainty.¹⁸⁰ This Article's findings suggest, however, that the reason the lower courts render inconsistent decisions, is not because the Supreme Court's directive in *Jones* is inherently flawed, but rather because lower courts interpret *Jones* too narrowly, leaving little room to understand the nature of the religious provision underpinning the dispute. Thus handicapped, courts are often unable to identify an appropriate civil legal tool to analogize to the religious article.

As noted earlier, the *Jones* majority categorically recognized the state's "obvious and legitimate interest" in providing a "civil forum" where religious disputes could be resolved conclusively.¹⁸¹ Also, as highlighted earlier, the judiciary has occasionally employed resources such as expert testimony as part of its choice-of-law decisions to understand religious standards without raising Establishment Clause concerns.¹⁸² The combination of *Jones*'s directive and the history of religious choice-of-law decisions points to an approach whereby civil courts can resolve religious disputes by first taking the opportunity to understand the religious instrument at issue and then, based on that comprehension, identify the closest matching secular tool with which to resolve the dispute.¹⁸³ In this way, courts would not base their decisions

¹⁷⁸ *Jones v. Wolf*, 443 U.S. 595, 604 (1979).

¹⁷⁹ See, e.g., Greenawalt, *supra* note 54, at 1883 (noting, despite tepid support for the neutral-principles approach, "that applications of neutral principles are nonuniform and unpredictable").

¹⁸⁰ See, e.g., John E. Fennelly, *Property Disputes and Religious Schisms: Who is the Church?*, 9 ST. THOMAS L. REV. 319, 353 (1997) (proposing that the use of "[n]eutral principles has led to the willy-nilly application" of a whole soup of neutral legal instruments resulting in "confusion and uncertainty").

¹⁸¹ *Jones*, 443 U.S. at 602.

¹⁸² See discussion *supra* text accompanying notes 71–73.

¹⁸³ See Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837, 858 (2009) ("That we do not think government officials may or should 'declare religious truth' does not mean—or, at least, it need not always mean—that they cannot take judicial notice of the fact that, say, ham-and-cheese sandwiches are not Kosher. . . . [or] to confirm, or take judicial notice of the fact, that the Roman Catholic Church teaches that 'Jesus of Nazareth . . . is the eternal Son of God made man.'" (second ellipsis in original)).

on any religious standard discussed by the experts,¹⁸⁴ but would use the information solely to identify an appropriate secular legal tool with which to resolve the *mahr* dispute.

Hampered by their limited understanding of the nature of the *mahr*, and based on the definition of a premarital agreement in the Uniform Premarital Agreement Act as a contract “made in contemplation of marriage and to be effective upon marriage,”¹⁸⁵ many courts reflexively analogize the *mahr* to a premarital agreement.¹⁸⁶ On closer examination, however, one can draw out key differences between a *mahr* provision and a prenuptial agreement. First, the tendency to compare the *mahr* to a premarital agreement stems largely from the judiciary’s assumption that Islamic marriage mirrors the Western narrative, which views marriage as either a sacrament or a simple civil union.¹⁸⁷ As a result, any financial agreement negotiated between a couple in the West as part of their marital arrangement entails an extra, voluntary step and, as such, is assumed to center around the bargaining away of certain rights. Thus, legal protections (crafted around premarital statutes and under the common law) mandate specific acts, such as the disclosure of the parties’ assets or the requirement that an attorney be present at the time the agreement is executed.¹⁸⁸ By contrast, an Islamic marriage is centered on a simple contract, which embodies certain mandatory terms as a pre-requisite for matrimony and is null and void without the necessary bargaining over the *mahr* provision. Muslims, who are quite familiar with the customary haggling over the *mahr*, are not under the slightest misconception that the negotiation represents in any remote way an extraordinary or unanticipated bargaining away of their rights.¹⁸⁹ The *mahr* is simply a gift, and any

¹⁸⁴ For an example of when courts cross the line and use religious doctrine to reach their result, see *Rahman v. Hossain*, No. A-5191-08T3, 2010 WL 4075316, at *4 (N.J. Super. Ct. App. Div. June 17, 2010) (holding that the *mahr* provision was unenforceable, because, under Islamic Law, the wife’s mental illness relieved the husband from his obligations under the contract).

¹⁸⁵ See, e.g., UNIF. PREMARITAL AGREEMENT ACT § 1(1), 9C U.L.A. 35 (2001). In addition, premarital agreements may also be governed by the Uniform Probate Code, see UNIF. PROBATE CODE (amended 2010), and the Uniform Marital Property Act, see UNIF. MARITAL PROP. ACT (1983).

¹⁸⁶ See, e.g., *Zawahiri v. Alwattar*, 2008-Ohio-3473U, 2008 WL 2698679, at ¶¶ 20–22 (Ct. App. July 10, 2008). This Article uses the terms “premarital agreement,” “antenuptial agreement,” and “prenuptial agreement” interchangeably.

¹⁸⁷ See Nathan B. Oman, *Bargaining in the Shadow of God’s Law: Islamic Mahr Contracts and the Perils of Legal Specialization*, 45 WAKE FOREST L. REV. 579 (2010) (providing a comprehensive examination of differences between the Western and Islamic narratives of marriage).

¹⁸⁸ See, e.g., UNIF. PREMARITAL AGREEMENT ACT § 6(a)(2)(i), 9C U.L.A. 35 (2001) (stating that the premarital agreement is unenforceable if there was no “fair and reasonable disclosure of the property or financial obligations of the other party” to “the party against whom enforcement is sought”).

¹⁸⁹ See Oman, *supra* note 187, at 600.

expectation over assets a Muslim husband or wife may have do not stem from the marriage contract, but rather from Islamic property law.¹⁹⁰

Second, the *mahr* constitutes a mandatory part of an Islamic marriage contract,¹⁹¹ unlike a prenuptial agreement, which is a voluntary agreement to modify certain civil standards. As such, while a couple entering into a civil marriage has to make a conscious decision to execute a prenuptial agreement, parties to an Islamic marriage contract cannot marry without a *mahr* provision. If they fail to agree upon a *mahr*, by default, under Islamic law, the husband will be required to give the wife a “proper *Mahr* which [is] in accordance with the *Mahr* usually paid to women of her category.”¹⁹²

Third, it is worth repeating that the Qur’an defines the *mahr* as a gift to the bride for entering into the marriage contract,¹⁹³ and not as a vehicle for apportioning property and resources at the time of divorce.¹⁹⁴ It is not therefore compensation to be distributed at the time of divorce, but a prize for the wife in exchange for her agreement to marry. As such, the *mahr* is payable at any time during the life of the marriage, even if the parties never divorce, while a prenuptial agreement mostly anticipates the division of resources in the event of a divorce. Consequently, because the *mahr* is not designed to address the division of assets, it lacks the procedural safeguards that exist in most prenuptial statutes. For example, there is neither a requirement for the “fair and reasonable disclosure of the property”¹⁹⁵ nor much sanction against what might be considered unconscionable behavior under statutory prenuptial regimes.

Fourth, in many Islamic countries there is no civil alternative to a religious agreement. Participants must enter into an Islamic marriage contract and, as noted above, by necessity stipulate to a *mahr* provision. Thus, many Muslim immigrants who married before coming to the United States may not have had the option of a civil marriage to avoid the *mahr* provision. Even Muslims living outside of Islamic countries at the time of their marriage, where, in theory, they have the option of foregoing a religious ceremony, are often under enormous pressure to solemnize their bond in accordance with religious procedure—otherwise their union would be deemed illegitimate with grave social implications. By contrast, no one in the United States is obligated to

¹⁹⁰ See *id.*

¹⁹¹ See BHALA, *supra* note 16, § 35.02[A].

¹⁹² *Islamic Laws: Marriage: Rules Regarding Permanent Marriage*, OFFICIAL WEBSITE HIS EMINENCE GRAND AYATOLLAH AL-SAYID ‘ALI AL-HUSAYNI AL-SISTANI, <http://www.sistani.org/english/book/48/2349> (last visited Feb. 20, 2014) (italics added); see also BHALA, *supra* note 16, § 35.02[A]; M. AFZAL WANI, *THE ISLAMIC INSTITUTION OF MAHR* 71–72 (1996).

¹⁹³ See Qur’an 4:4; see also BHALA, *supra* note 16, § 35.02[A].

¹⁹⁴ See BHALA, *supra* note 16, § 35.02[A] (describing the *mahr* as a “nuptial gift”).

¹⁹⁵ UNIF. PREMARITAL AGREEMENT ACT § 6(a)(2)(i), 9C U.L.A. 35 (2001).

enter into a prenuptial agreement and in the process potentially forgo the benefits of civil family law protections.

A final unusual characteristic of the *mahr* (and the Islamic marriage contract in general) that differentiates it from a prenuptial agreement relates to the wife's rights to divorce under Islamic Law, which are much more limited than a husband's. Under Islamic standards, one way for the wife to obtain a divorce is to offer to give up her *mahr*.¹⁹⁶ According to some Islamic authorities, the amount of property the husband takes in consideration for granting a divorce should not exceed the *mahr* in the case of a "Mubarat Divorce," where the husband and wife develop "mutual aversion" to each other,¹⁹⁷ but may exceed the *mahr* in the case of a "Khula' Divorce," where the wife alone develops an aversion to the husband.¹⁹⁸ This contrasts dramatically with the general standard in the United States where women have the same rights to divorce as men and are typically not under pressure to relinquish the assets already allocated to the wife in a prenuptial agreement to coax a divorce from their husbands.

Ignoring these glaring distinctions between a *mahr* and a prenuptial agreement can lead to some unwelcome results in the lower courts. The most obvious risk of analogizing the *mahr* to a premarital agreement is that it could easily be struck down on technical grounds because it is negotiated simply according to community customs without attention to common law and statutory standards that must be met when executing a legally binding prenuptial agreement. Consequently, when a *mahr* agreement is struck down because it was not entered into in a timely manner or because the parties failed to consult a lawyer or properly disclose their assets, the wife is deprived of the benefit of her contractual bargain, even though none of these steps were a pre-requisite at the time she executed the *mahr*.¹⁹⁹

¹⁹⁶ See BHALA, *supra* note 16, § 33.04[A] (explaining different methods of divorce under the Shariah, including "al khala" divorce, which "occurs when a wife gives back to her husband her nuptial gift" and "[a]t that point . . . the marriage ends").

¹⁹⁷ *Islamic Laws: Divorce: Mubarat Divorce*, OFFICIAL WEBSITE HIS EMINENCE GRAND AYATOLLAH AL-SAYID 'ALI AL-HUSAYNI AL-SISTANI, <http://www.sistani.org/english/book/48/2362> (last visited Feb. 20, 2014).

¹⁹⁸ *Islamic Laws: Divorce: Khula' Divorce or Talaqul Khula'*, OFFICIAL WEBSITE HIS EMINENCE GRAND AYATOLLAH AL-SAYID 'ALI AL-HUSAYNI AL-SISTANI, <http://www.sistani.org/english/book/48/2361> (last visited Feb. 20, 2014).

¹⁹⁹ See, e.g., *Ahmed v. Ahmed*, 261 S.W.3d 190 (Tex. App. 2008). In *Ahmed*, the parties entered into their civil marriage six months prior to executing an Islamic marriage contract, which stipulated that the husband pay a deferred *mahr* of \$50,000 to the wife. *Id.* at 192-93. The Texas Court of Appeals evaluated the *mahr* provision as a premarital agreement and held that it was invalid because it was entered into after the civil ceremony, rather than made in contemplation of marriage. *Id.* at 194. Yet Muslims living in non-Muslim jurisdictions very frequently enter into both civil and religious arrangements with no particular attention to the order of these events. Since under Islamic law, the *mahr* constitutes an agreement by the

Ironically, a potentially even more damaging fate may befall the wife if the court mischaracterizes the *mahr* as a prenuptial agreement and then upholds it as the parties' sole agreement for the comprehensive division of all their marital property, often placing the wife in a dramatically weaker position than if the allocation of assets was adjudicated under a civil regime. While many state prenuptial statutes contain default rules giving the wife rights in property titled in the husband's name if a civil prenuptial agreement is silent on marital property, Islamic law does not give the wife any rights in property titled in her husband's name, and, since the *mahr* is not designed to address the division of the marital estate, she is often left at the time of divorce only with the gift she received for entering into the marriage.²⁰⁰

Some lower court decisions indicate that, in an effort to reach a just outcome, courts are willing to treat factually similar cases very differently and strike down a *mahr* provision on public policy grounds if drawing the parallel with a prenuptial agreement will deprive the wife of any meaningful amount of community property,²⁰¹ but uphold the validity of the *mahr* as a premarital agreement in the absence of a significant marital estate, so that the wife may derive some financial benefit from the union.²⁰² For example, in *Shaban v. Shaban*, the husband argued that the marriage contract constituted a prenuptial agreement and signified the wife's assent to accepting a thirty dollar *mahr* in place of a share of the parties' three million dollar estate.²⁰³ The California Court of Appeals confirmed the lower court's ruling that the terms of the contract were too vague to constitute a prenuptial agreement and instead held that the document was a simple "marriage certificate."²⁰⁴

husband to give a gift to the prospective bride, the timing of the civil ceremony should be irrelevant.

²⁰⁰ See, e.g., *Aleem v. Aleem*, 947 A.2d 489, 491 (Md. 2008) ("If the Pakistani marriage contract is silent, Pakistani law does not recognize marital property. [Whereas, i]f a premarital or post-marital agreement in Maryland is silent with respect to marital property, . . . the default under Maryland law is that the wife has marital property rights in property titled in the husband's name." (quoting *Aleem v. Aleem*, 931 A.2d 1123, 1134 (Md. Ct. Spec. App. 2007)) (internal quotation marks omitted)); see also BHALA, *supra* note 16, §§ 35.01–35.02[A].

²⁰¹ See, e.g., *In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863, 865 (Ct. App. 2001); *Chaudhary v. Ali*, No. 0956-94-4, 1995 WL 40079, at *1–2 (Va. Ct. App. Jan. 31, 1995).

²⁰² See, e.g., *Akileh v. Elchahal*, 666 So. 2d 246, 248 (Fla. Dist. Ct. App. 1996).

²⁰³ *Shaban*, 105 Cal. Rptr. 2d at 866, 870.

²⁰⁴ *Id.* at 865 (internal quotation marks omitted). In *Chaudhary*, the husband analogized the whole marriage contract, or "nikah nama," to a "prenuptial agreement which bars [the] wife from receiving anything from [the] husband upon their divorce." *Chaudhary*, 1995 WL 40079, at *1. In rejecting the husband's argument, the court declared that the marriage contract did not constitute a valid premarital agreement because it failed to either make "fair and reasonable provision" for the spouse or provide a "full and frank disclosure" of the husband's worth to the wife prior to signing the agreement. *Id.* (quoting *Batleman v. Rubin*, 98 S.E.2d 519, 521 (Va. 1957)) (internal quotation marks omitted). Similarly, in *In re Marriage of Altayar*, No. 574745-2-I, 2007 WL 2084346 (Wash. Ct. App. July 23, 2007) (per curiam), the wife, under threat of

On the other hand, in *Akileh v. Elchahal*, where the marital estate was insignificant, but the parties had stipulated to a \$50,000 *mahr* provision, the court, confronted with perhaps an even vaguer marriage contract than the one in *Shaban*, readily ruled that the *mahr* constituted an enforceable prenuptial agreement, entitling the wife to the \$50,000 she demanded under the terms of the document.²⁰⁵ The court's sympathies were particularly aroused in this case because the wife sought divorce after she contracted genital warts from her husband a year after the marriage, which condition he had failed to disclose prior to their union.²⁰⁶ Similarly, in *Afghahi v. Ghafoorian*, where the couple had no other assets, the court held that the marriage contract constituted a premarital agreement and enforced payment under the *mahr* provision.²⁰⁷

While the courts' concern for the wives' welfare in these cases is admirable, the inconsistency, which results from comparing the *mahr* to a premarital agreement, weakens the value (and predictability) of the *mahr* decisions in guarding against gender discrimination. In all of the above cases, the courts could have arrived at the same result by comparing the *mahr* to a simple contract instead of a premarital agreement. By drawing the parallel to a simple contract, the court in *Shahban*²⁰⁸ could have enforced the husband's commitment to pay a nominal sum under the Islamic marriage contract and still divided the marital estate according to civil standards. Similarly, the *Akileh* and *Afghahi* courts could have evaluated the *mahr* provisions as simple contracts and examined if the parties had a valid arrangement pursuant to civil contract law. In this way, the methodology of all the decisions would have been uniform, instead of diametric opposites, thereby avoiding the need to manipulate the technical requirements of what constitutes a valid premarital agreement to reach a desired result.

The strategy of evaluating *mahr* provisions as premarital agreements becomes even riskier in disputes where the marriage took place abroad. In these decisions, courts face greater pressure to either enforce *mahr* provisions as premarital agreements (as part of a foreign divorce order), to the great financial detriment of women, or to strike down the foreign divorce orders and confront charges of defective

physical violence, signed a quit claim deed transferring her rights in the community property (the family home and a service garage) to her brother in law. *Id.* at *1. The court refused to recognize the *mahr* (consisting "of 19 grams of 21 karat gold" and a Qur'an) as a valid substitute for the wife's fair share of the community property. *Id.* at *1, *4.

²⁰⁵ *Akileh*, 666 So. 2d at 247, 249.

²⁰⁶ *Id.* at 247.

²⁰⁷ See *Afghahi v. Ghafoorian*, No. 1481-09-4, 2010 WL 1189383, at *1 n.1, *4 (Va. Ct. App. Mar. 30, 2010) (discussing marriage contract that stipulated, among other nominal items, to a *mahr* in the amount of 514 gold coins valued at approximately \$141,100).

²⁰⁸ The same argument applies to other similarly decided cases including *Chaudhary*, 1995 WL 40079, at *1-2, and *Altayar*, 2007 WL 2084346. See *supra* note 204.

comity analysis.²⁰⁹ Furthermore, this group of decisions highlights the ease with which some courts fall into the trap of resolving *mahr* decisions on religious grounds instead of deploying the neutral-principles approach set forth in *Jones*.

In *Chaudry v. Chaudry*,²¹⁰ a couple moved to the United States after marrying in Pakistan pursuant to an Islamic ceremony in 1961.²¹¹ In 1968, the wife moved back to Pakistan with her two children, thinking that her husband would permanently join her.²¹² Instead, the husband took affirmative steps to prevent his wife and children from moving back to the United States to live with him, and in 1973, informed the wife by mail that he had filed divorce papers with the Pakistani consulate in New York City.²¹³ The divorce was confirmed by Pakistani courts in 1974 and 1975 respectively, but the wife instituted a separate maintenance action in New Jersey in 1975.²¹⁴ The New Jersey appellate division reversed the trial court and upheld the Pakistani divorce pursuant to the “the principles of comity.”²¹⁵ The court reasoned that the five years the wife had spent in the United States and the husband’s ongoing domicile in New Jersey constituted an insufficient “nexus” to New Jersey for its courts to award the wife equitable distribution of property.²¹⁶ The court then went on, incorrectly, to equate the Islamic marriage contract with a prenuptial agreement, but, instead of using the neutral-principles approach to gauge its validity, it applied Pakistani law, which, for the major tenets of family law, is based on the Shariah.²¹⁷ As part of its analysis, the court conceded that, according to expert testimony, under Pakistani law, the wife “was not entitled to alimony or support upon a divorce” and that “[a] provision in the agreement to the contrary would be void as a matter of law.”²¹⁸ In other words, the court acknowledged that, at the time of her marriage, the wife was categorically forbidden to negotiate any terms regarding support—in contrast to prenuptial regimes in the

²⁰⁹ See Estin, *supra* note 6, at 586–88; Rajni K. Sekhri, Note, Aleem v. Aleem: A Divorce from the Proper Comity Standard—Lowering the Bar That Courts Must Reach to Deny Recognizing Foreign Judgments, 68 MD. L. REV. 662, 689–90 (2009) (criticizing the *Aleem* court’s “defective comity analysis”).

²¹⁰ 388 A.2d 1000 (N.J. Super. Ct. App. Div. 1978).

²¹¹ *Id.* at 1003–04.

²¹² *Id.*

²¹³ *Id.* at 1004.

²¹⁴ *Id.* at 1004–05.

²¹⁵ *Id.* at 1005, 1008; see also Sherif v. Sherif, 352 N.Y.S.2d 781, 783–84 (Fam. Ct. 1974) (upholding an Egyptian divorce on the basis of comity).

²¹⁶ *Chaudry*, 388 A.2d at 1006.

²¹⁷ Oman, *supra* note 187, at 580, 596–97 (noting that the court wrongly “assumed that the contract must be a premarital agreement” intended to “bargain[] away rights in divorce,” while also acknowledging that “Pakistani family law follows the classical *fiqh* in providing no equitable distribution of property upon divorce”).

²¹⁸ *Chaudry*, 388 A.2d at 1004.

United States, which generally do not even allow the parties to waive alimony,²¹⁹ never mind tolerate a blanket prohibition on the parties' right to negotiate support benefits. Yet, despite such glaring discrepancies, the court concluded "that the wife is not entitled to equitable distribution by reason of the [antinuptial] agreement" and limited her to a single, lump sum payment of \$1,500.²²⁰

Thirty years later, in *Aleem v. Aleem*, the Maryland Court of Appeals came to the opposite conclusion in a case where the couple had married in Pakistan but lived in the United States for twenty years, with the husband on a special work visa and the wife a green card holder.²²¹ The husband worked at the World Bank, and the dispute concerned the division of his pension. After the wife initiated divorce proceedings, the husband went to the Pakistani embassy in Washington, D.C. and obtained an Islamic divorce, or *talaq*, by declaring three times "I Divorce thee Farah Aleem."²²² The court compared the Pakistani marriage contract to a premarital agreement, but rejected the husband's claim that payment of the *mahr*, in the amount of \$2,500, was all that was "due the wife, as opposed to the one half of almost two million dollars that she might be entitled to under Maryland law."²²³ The Court reasoned that the Pakistani marriage contract could not be equated with a valid premarital agreement because Islamic law, which formed the basis of Pakistani family law, and Maryland law differed dramatically on how marital property is apportioned between the parties when there is no agreement in place. The court noted that, under Islamic Law, if the marriage contract is silent on the division of marital assets, the wife is not entitled to any of the community property that is not in her name, while the opposite is true under Maryland law, whereby if the premarital agreement is silent, "the wife has . . . rights in property titled in the husband's name."²²⁴ After striking down the *mahr* arrangement on technical grounds, the court extended its examination on religious grounds to the comity issue and refused to recognize *talaq* laws in Pakistan. The court held that because the husband could execute a divorce unilaterally without either notice to the wife or any opportunity to share in the equal division of the marital property, the conflict was

²¹⁹ Jonathan E. Fields, *Forbidden Provisions in Prenuptial Agreements: Legal and Practical Considerations for the Matrimonial Lawyer*, 21 J. AM. ACAD. MATRIMONIAL LAW. 413, 423 (2008) (stating that waivers of spousal support were prohibited at common law and that even in states where such waivers are now permissible, enforcement is prohibited if it "would render the spouse a public charge" or if the waiver fails "the substantive or procedural fairness tests").

²²⁰ *Chaudry*, 388 A.2d at 1006.

²²¹ *Aleem v. Aleem*, 947 A.2d 489, 494 (Md. 2008).

²²² *Id.* at 490 (internal quotation marks omitted).

²²³ *Id.* at 493 n.5, 494.

²²⁴ *Id.* at 491 (quoting *Aleem v. Aleem*, 931 A.2d 1123, 1134 (Md. Ct. Spec. App. 2007)) (internal quotation marks omitted).

“so substantial that applying Pakistani law in the instant matter would be contrary to Maryland public policy.”²²⁵

Notwithstanding radically different outcomes, both courts made the mistake of comparing the applicable Islamic marriage contract to a prenuptial agreement and then evaluating the wife’s rights according to religious standards, an approach that is particularly tempting when the court seeks, pursuant to established comity standards, to uphold a foreign divorce. In this way, the *Chaudry* decision subjected itself to the charge that it showed scant concern for women’s welfare and gender equality, while the *Aleem* decision exposed itself to the allegation that it resolved the dispute in an overbearing fashion showing total disrespect for established rules of Comity.²²⁶ If both courts had instead resolved the disputes by analogizing the Islamic marriage agreement to a simple contract rather than a prenuptial agreement and employed the neutral-principles approach, they could have upheld the foreign divorce, enforced the parties’ arrangement on the *mahr*, and allocated assets and support according to the relevant state statutes. To this end, the *Chaudry* court even acknowledged that there was much precedent under New Jersey law for awarding alimony and equitable division of property where a foreign divorce does not provide for these rights.²²⁷

The final two cases, *Zawahiri v. Alwattar*²²⁸ and *Odatalla v. Odatalla*,²²⁹ best demonstrate how the selection of secular terms with

²²⁵ *Id.* at 491, 500 (quoting *Aleem*, 931 A.2d at 1134) (internal quotation marks omitted); see also *Maklad v. Maklad*, No. FA000443796S, 2001 WL 51662, at *2 (Conn. Super. Ct. Jan 3, 2001) (holding that an Egyptian divorce order was invalid because it was obtained without accommodating the wife’s due process rights); *Tarikonda v. Pinjari*, No. 287403, 2009 WL 930007, at *2–3 (Mich. Ct. App. Apr. 7, 2009) (reversing the trial court and holding that *talaq* violated the wife’s due process rights because of the (1) failure to notify the wife of the performance of *talaq*, (2) lack of legal representation and right to be present at the time of *talaq* pronouncement, and (3) overall lack of opportunity to provide a hearing; recognizing that *talaq* falls short under Michigan public policy because Islamic law does not provide for an equitable division of the marital estate, but rather only entitles a wife to property that is in her name); *In re Ramadan*, 891 A.2d 1186, 1188, 1190 (N.H. 2006) (denying comity to Lebanese divorce whereby the husband performed *talaq* himself one day before the wife filed for divorce in New Hampshire and stating that “[c]omity . . . is a discretionary doctrine that will not be applied if it violates a strong public policy of the forum state, or if it leaves the court in a position where it is unable to render complete justice”); *Farag v. Farag*, 772 N.Y.S.2d 368, 371 (App. Div. 2004) (recognizing comity with Egyptian divorce law but holding that “a foreign divorce decree obtained on the ex parte petition of a spouse present but not domiciled in the foreign country will not be recognized in New York where the other nonresident spouse does not appear and is not served with process” (internal quotation marks omitted)).

²²⁶ See *Sekhri*, *supra* note 209, at 689 (calling the court’s comity analysis “defective”).

²²⁷ *Chaudry v. Chaudry*, 388 A.2d 1000, 1006 (N.J. Super. Ct. App. Div. 1978). The court left open the possibility for an equitable distribution of property “where there is a sufficiently strong nexus between the marriage and th[e] State [of New Jersey].” *Id.* (citing *Healey v. Healey*, 377 A.2d 762 (N.J. Super. Ct. App. Div. 1977)); see also *Pierrakos v. Pierrakos*, 372 A.2d 1331 (N.J. Super. Ct. App. Div. 1977).

²²⁸ 2008-Ohio-3473U, 2008 WL 2698679 (Ct. App. July 10, 2008).

²²⁹ 810 A.2d 93 (N.J. Super. Ct. Ch. Div. 2002).

which to scrutinize the *mahr* can change the outcome of a dispute even when the facts are strikingly similar. In both instances, the courts employed *Jones's* neutral-principles doctrine, but one compared the *mahr* to a premarital agreement, while the other drew the parallel to a simple contract.²³⁰ In *Zawahiri*, the couple married pursuant to an Islamic ceremony, after being introduced by their parents. According to tradition, at the time of the ceremony, they negotiated and signed the marriage agreement at the house of the bride's parents. The opinion indicates that the groom and the prospective bride's father were advised by some of the male witnesses to the marriage on an appropriate amount for the *mahr* and "[u]ltimately . . . settled on \$25,000 for the 'postponed' portion of the *mahr*" and on a ring and gold already given to the bride.²³¹ The couple in the second case, *Odatalla*, also entered into an Islamic marriage contract at the home of the prospective bride and proceeded to negotiate the terms and conditions of the *mahr* at the time of the ceremony. The *Odatalla* opinion describes a videotape that shows the families sitting around the living room "negotiating the terms and conditions of the entire Islamic marriage license."²³² There was no attorney present at either ceremony, a fact specifically stipulated in the *Zawahiri* decision,²³³ but also implied by the *Odatalla* opinion.²³⁴

However, despite the factual parallels, the outcomes of the two decisions differ dramatically because the *Zawahiri* court analogized the *mahr* to a premarital agreement,²³⁵ whereas the *Odatalla* court called it "nothing more and nothing less than a simple contract between two consenting adults."²³⁶ In *Zawahiri*, the Ohio Court of Appeals rejected, on procedural grounds, the wife's argument that the *mahr* provision should be evaluated as a general contract,²³⁷ even though it acknowledged that out-of-state courts had accepted similar comparisons. Instead, the court persisted in comparing the *mahr* to a premarital agreement and upheld the lower court's ruling striking down the *mahr* provision because the circumstances, including the husband's inability to consult with counsel, indicated "overreaching" and failed to

²³⁰ Although the Ohio Court of Appeals in *Zawahiri* refused to compare the *mahr* to a general contract because the wife failed to raise the argument at trial (and therefore waived it), the comparison with *Odatalla* is still valuable because it illustrates the importance of choosing an appropriate neutral instrument when applying the neutral-principles doctrine.

²³¹ *Zawahiri*, 2008 WL 2698679, at ¶ 5.

²³² *Odatalla*, 810 A.2d at 95.

²³³ *Zawahiri*, 2008 WL 2698679, at ¶ 23.

²³⁴ *Odatalla*, 810 A.2d at 94–95.

²³⁵ *Zawahiri*, 2008 WL 2698679, at ¶¶ 20–23.

²³⁶ *Odatalla*, 810 A.2d at 98.

²³⁷ *Zawahiri*, 2008 WL 2698679, at ¶¶ 9–10 (refusing to evaluate the merits of the wife's claim, who, having realized her error in analogizing the *mahr* provision to a premarital agreement, tried to persuade the Court of Appeals to uphold the *mahr* as a simple contract, because she had not preserved the claim for review).

meet the standard under Ohio law that the parties enter into a premarital agreement “freely without fraud, duress, coercion, or overreaching.”²³⁸

In comparing the *mahr* to a prenuptial agreement, the *Zawahiri* court misunderstood both the nature of the *mahr* and the cultural context in which it is commonly negotiated. As one scholar has noted, negotiating the *mahr* at the time of the ceremony is “as much a part of the social script of Muslim marriages as church bells, aisles, alters, and priests or ministers are for Christian marriages.”²³⁹ It is therefore highly unlikely that a Muslim man entering into an arranged marriage, such as the one described in the *Zawahiri* case, would not be fully aware that a *mahr* must be negotiated as part of the ceremony. In *Zawahiri*, the court seemed swayed by the husband’s claim that the imam raised the issue of *mahr* only two hours before the ceremony and that, after a hurried negotiation, “[he] agreed to a ‘postponed’ *mahr* of \$25,000 because he was embarrassed and stressed.”²⁴⁰ Also, it is not surprising that the facts of the two cases are strikingly similar since they follow common cultural practices of many Muslim weddings. It is not unusual for the parties to negotiate the details of the *mahr* in the absence of an attorney²⁴¹ and at the last minute right before the ceremony.²⁴² Thus, the *Zawahiri* court’s depiction of the *mahr* negotiations as crafty and coercive is completely misrepresentative. While a similar sequence of events as part of negotiating a prenuptial agreement in the West may seem conniving, the wedding process described in *Zawahiri* is quite standard. Under these circumstances, the *Zawahiri* court, by comparing the *mahr* to a premarital agreement, was forced into a theoretical straitjacket, almost guaranteeing that it would strike down the *mahr* provision on technical grounds.

By contrast, the *Odatalla* court was not at all disturbed by the absence of an attorney and the lack of any pre-planning in negotiating the details of the *mahr*.²⁴³ Furthermore, the court rejected the husband’s claim that it was prohibited from adjudicating the dispute under the Establishment Clause and squarely grounded its holding in the neutral-principles approach.²⁴⁴ Relying on *Jones*, the court stated that agreements reached as part of a religious ceremony are enforceable if

²³⁸ *Id.* ¶ 13.

²³⁹ Oman, *supra* note 187, at 602.

²⁴⁰ *Zawahiri*, 2008 WL 2698679, at ¶ 23.

²⁴¹ The custom of not having an attorney present was acknowledged in *Ali*. See Chaudhary v. Ali, No. 0956-94-4, 1995 WL 40079, at *1 (Va. Ct. App. Jan. 31, 1995) (“It is not customary for the parties to receive legal counsel prior to signing the agreement.”).

²⁴² The author has witnessed frenzied, last-minute negotiations at many Islamic marriages and at one union was given the responsibility, without any advanced notice, of negotiating the *mahr* shortly before the ceremony.

²⁴³ See *Odatalla v. Odatalla*, 810 A.2d 93, 94–95 (N.J. Super. Ct. Ch. Div. 2002).

²⁴⁴ *Id.* at 94–97.

they (1) are “capable of specific performance under ‘neutral principles of law’” and (2) “meet[] the state’s standards for those ‘neutral principles of law’.”²⁴⁵ In selecting an appropriate civil legal doctrine, the court declared that the *mahr* was “nothing more and nothing less than a simple contract between two consenting adults” and held that “the essential elements of a contract [were] present.”²⁴⁶ To that end, the New Jersey Superior Court approvingly cited the videotape of the last-minute negotiations during the marriage party to show that the husband executed the marriage agreement “freely and voluntarily . . . making an offer to the [wife],” and the wife signed “making an acceptance of the offer.”²⁴⁷ The court also noted that Mr. Odatalla gave “one gold coin” to the wife as “the symbolic first payment[,] . . . confirming his intention to be bound by the *Mahr* Agreement.”²⁴⁸

As this brief survey of Islamic divorce cases demonstrates, the judiciary makes two mistakes in resolving *mahr* disputes. First, courts do not take the effort to understand the nature of the *mahr* and wrongly compare it to a premarital agreement.²⁴⁹ As a result, the decisions often do not reflect the intent of the parties and frequently allow one party to exploit technicalities under civil law to forgo his or her obligation, sometimes resulting in gross unfairness to the other party. In addition to better reflecting the parties’ intent, taking steps to understand the *mahr* and drawing the parallel to a simple contract may also ease courts’ temptation to reach fair results at any cost, even by manipulating the technical requirements for what constitutes a valid prenuptial.²⁵⁰

²⁴⁵ *Id.* at 98.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 97.

²⁴⁸ *Id.*

²⁴⁹ See, e.g., *Chaudry v. Chaudry*, 388 A.2d 1000 (N.J. Super. Ct. App. Div. 1978). At this point, you may be wondering whether this Article contradicts itself, because in the earlier discussion on the *get* cases, the Article warns against adjudicating contracts based on an interpretation of the “laws of Moses and Israel.” So how, you may wonder, can courts start exploring the *mahr* without running into Establishment Clause concerns? This is a worthy criticism, but I would suggest that in some of the potentially unconstitutional *get* decisions, courts use expert testimony to figure out when, according to the “laws of Moses and Israel,” a husband may be obligated to grant a *get*, whereas in this Section, I am recommending that courts use expert testimony for the limited purpose of figuring out what a *mahr* is—is it a prenuptial agreement, a gift, or a simple contract? The courts would not be taking the extra step of trying to decipher what role a *mahr* provision plays in the division of assets under Islamic law. Similarly, in the *get* cases, it would be fine to use expert testimony to identify that a *get* is a Jewish divorce, but not to explore under what circumstances a *get* must be granted pursuant to the “laws of Moses and Israel.”

²⁵⁰ As demonstrated earlier, the comparison between the *Zawahiri* and *Odatalla* decisions reveals that *mahr* disputes, even when framed by very similar facts, are interpreted in conflicting ways because courts facing large marital estates are often reluctant to deprive the wife of her economic rights, but courts facing insignificant marital estates wish for her to obtain the benefit of her bargain under the *mahr* provision. See *supra* notes 228–48 and accompanying text.

Second, some courts tend to ignore the neutral-principles approach and evaluate *mahr* disputes based on Islamic standards. This risks running afoul of Establishment Clause limitations on the judiciary's ability to delve into religious doctrine.²⁵¹ The solution to both these mistakes is to use neutral principles of contract law only to interpret the specific *mahr* provisions in the marriage contract, thereby avoiding the trap of applying Islamic rather than American law to a couple's divorce arrangement. Drawing the parallel to a simple contract would also go a long way toward harmonizing disputes involving marriage contracts negotiated abroad and allow the judiciary the flexibility to recognize Islamic divorce, or *talaq*, without necessarily dividing the couples' marital estate based on religious rather than civil standards. Hence, rooting courts' decisions on civil contract law would strengthen the judiciary's ability to render well-thought-out, consistent decisions, eliminate the most glaringly unfair outcomes, and lower the risk of basing their evaluation on religious standards.

Next this Article considers the increased use of religious arbitration, which has forced many nations to grapple with how to best integrate religious legal pluralism into their judicial framework.²⁵² Given this shift, it is important to examine whether deference by the civil judiciary to religious tribunals sanctions a form of autonomous religious governance that could result in violation of individual liberties and run the risk of indirectly injecting into the legal system discrimination that has only recently been eliminated.

²⁵¹ See Oman, *supra* note 187, at 600 (proposing that a Muslim man's expectation that his wife is not entitled to the marital estate "arises because of the background rules of Islamic property law," not "as a matter of contract").

²⁵² It is worth noting that while there has been a dramatic rise in religious arbitration in the United States, this trend is not reflected globally. In Ontario, Canada, for example, where Christian and Jewish arbitration panels have been functioning for some time, the attempt to authorize Islamic arbitration of family disputes ran into a groundswell of opposition over concerns that such a system could permit serious departures from secular guarantees of gender equality. As a result, on September 11, 2005, Ontario banned all religious arbitration of family disputes (including Christian and Jewish forums), with Premier Dalton McGuinty declaring: "There will be no religious arbitration in Ontario. There will be one law for all Ontarians." Prithi Yelaja & Robert Benzie, *McGuinty: No Sharia Law*, TORONTO STAR, Sept. 12, 2005, at A01. The Quebec legislature also unanimously rejected the use of Islamic tribunals. Keith Leslie, *No Sharia in Ontario: All Religious Arbitration to Be Prohibited, McGuinty Says*, MONTREAL GAZETTE, Sept. 12, 2005, at A1. Similarly, the Archbishop of Canterbury, Dr. Rowen Williams, came under severe criticism after he called for plural jurisdiction and the need to adopt part of the Shariah in the United Kingdom. Ruth Gledhill & Philip Webster, *Archbishop of Canterbury Argues for Islamic Law in Britain*, TIMES (London), Feb. 8, 2008, at 1. Unlike Canada, however, the United Kingdom quietly set up the Muslim Arbitration Tribunal in 2007 to settle certain civil disputes between Muslims. The Tribunal's "decisions are enforceable in the UK courts." Frances Gibb, *Are Sharia Courts Depriving Women of Their Legal Rights?; A New Bill Highlights Worries That a Parallel Legal System is Being Developed*, Reports Frances Gibb, TIMES (London), June 16, 2011, at 67.

III. RELIGIOUS ARBITRATION

This Article's central inquiry has focused on whether parties to religious contracts should have recourse to civil courts to resolve potential disagreements. This question embodies two main areas of concern, and, so far, the examination has centered on whether civil courts have any meaningful authority under the Religion Clauses of the Constitution to resolve religious disputes. Within the context of religious divorce cases, this Article suggests that courts do indeed have real power pursuant to the neutral-principles approach to substantively review certain religious disputes. This Part now turns to the second area of concern and asks whether it would not be more prudent for courts to defer to the holdings of religious forums even when they have the constitutional authority to review religious disputes. In the United States, religious tribunals, including Christian organizations, such as Peacemaker Ministries, and Beth Dins, routinely resolve doctrinal disagreements as well as commercial and family law disagreements.²⁵³ There are also a growing number of forums for Islamic arbitration.²⁵⁴ Wherever available, parties may submit their disputes to an arbitration court, such as an "Islamic Mosque,"²⁵⁵ and, at least in Texas, parties can stipulate to religious arbitration under the Texas General Arbitration Act to resolve their marital disputes.²⁵⁶

Currently, following the Supreme Court's interpretation of the FAA urging deference to arbitration panels,²⁵⁷ secular courts regularly uphold religious tribunals' decisions without addressing the substantive issues that shaped the original dispute. Supporters of this approach propose that judicial acquiescence to religious arbitration follow the same parameters as deference to secular arbitration, where any compromise of individuals' rights is simply the price to pay for an efficient system of binding arbitration.²⁵⁸ This superficial symmetry,

²⁵³ See Grossman, *supra* note 1.

²⁵⁴ See Helfand, *supra* note 2, at 1250 (citing examples of initiatives for the establishment of Islamic arbitration venues such as the Fiqh Council of North America).

²⁵⁵ See Abd Alla v. Mourssi, 680 N.W.2d 569, 570–71, 574 (Minn. Ct. App. 2004) (evaluating and affirming the validity of an arbitration award by "the Arbitration Court of an Islamic Mosque" (whose jurisdiction the parties had stipulated to in a partnership agreement) and holding that the plaintiff failed to follow statutory time requirements under the Minnesota arbitration statute for filing a timely protest); see also Charles P. Trumbull, Note, *Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts*, 59 VAND. L. REV. 609, 640–46 (2006) (proposing that "judges . . . infer an arbitration clause into Islamic contracts").

²⁵⁶ See Jabri v. Qaddura, 108 S.W.3d 404, 407 (Tex. App. 2003) (enforcing parties' agreement that all their disputes be submitted to the Texas Islamic Court).

²⁵⁷ See, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24–26 (1991); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 480–81 (1989).

²⁵⁸ See Joel A. Nichols, *Multi-Tiered Marriage: Ideas and Influences from New York and Louisiana to the International Community*, 40 VAND. J. TRANSNAT'L L. 135, 140–41 (2007) (advocating broadly for deference to religious arbitration); Edward A. Zelinsky, *Deregulating*

however, fails to take into consideration ways in which religious arbitration opens the door to a whole series of laws with a different spirit than laws that govern the secular arbitration system. There are two possible unwelcome consequences. First, the individual rights of the party challenging the religious arbitration award may be compromised under rules that violate equity norms and diverge dramatically from civil standards that the party would ordinarily be judged by in a secular forum.²⁵⁹ Second, basing religious arbitration awards on biased standards may impact “substantial public and third-party interests,”²⁶⁰ with the risk of re-inscribing into law through a back door “discrimination that has only recently been ameliorated.”²⁶¹

The judiciary, therefore, finds itself in an awkward position where it is empowered to substantively review many religious awards under the neutral-principles doctrine but is held at bay by the Supreme Court’s interpretation of the FAA. As a result, it seems appropriate to investigate whether the Court’s strict guidelines under the FAA should be loosened and to explore circumstances under which deference to religious arbitration is appropriate. Many commentators persuasively argue that religious arbitration should be non-binding in order to permit the courts the right to substantively review all such awards.²⁶² Ayelet Shachar, who has written extensively on this issue, proposes under her theory of “transformative accommodation,” which seeks a balance between personal liberties and religious practices, that parties should have the right to opt out of religious arbitration when the “relevant power-holder has failed to provide remedies to the plight of

Marriage: The Pro-Marriage Case for Abolishing Civil Marriage, 27 CARDOZO L. REV. 1161, 1185 (2006).

²⁵⁹ For example, certain religious traditions set limitations on the admissibility of women’s testimony, which is a dramatic deviation from the civil rules of evidence. See Mohammad Fadel, Note, *Two Women, One Man: Knowledge, Power, and Gender in Medieval Sunni Legal Thought*, 29 INT’L J. MIDDLE E. STUD. 185 (1997) (discussing how different schools of Islamic jurisprudence address limitations on the value of women’s testimony); Grossman, *supra* note 1, at 181 (“[S]trict Jewish law categorically excludes women from serving as judges, and, along with the handicapped, minors, and others, excludes women from testifying as witnesses.” (citing 1 EMANUEL QUINT, A RESTATEMENT OF RABBINIC CIVIL LAW 255–56 (1990))).

²⁶⁰ Griffin, *supra* note 5, at 1852 (internal quotation marks omitted).

²⁶¹ Estin, *supra* note 6, at 590. I am not simply making the narrow argument that courts should defer to secular, but not religious arbitration. In all likelihood, any such proposal would have to pass the real strict scrutiny standard set forth in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). Rather, my concern is with automatic deference to any arbitration body that applies sex-discriminatory rules, including a secular forum, which, pursuant to the parties’ contract, relies on the foreign law of a country that violates the equity norms embodied in the civil standards of this country.

²⁶² See, e.g., AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN’S RIGHTS 122 (2001) (proposing that parties should be permitted to opt out when “power-holders fail to effectively respond to constituent needs”); Maria Reiss, Note, *The Materialization of Legal Pluralism in Britain: Why Shari’a Council Decisions Should Be Non-Binding*, 26 ARIZ. J. INT’L & COMP. L. 739, 777 (2009) (arguing that “Shari’a Councils [should] remain functioning as non-binding tribunals as they have been in the past”).

the individual.”²⁶³ She worries that giving religious tribunals unbounded jurisdiction over group members not only impacts individual liberties, but also stunts the cause of reform because religious leaders may deem “all ‘alternative’ suggestions for reform as signs of cultural decay and corrupting outside infiltration.”²⁶⁴ At the same time, within the context of deference to religious tribunals, she rejects the state’s role as a guarantor of a limited set of basic rights since such an approach handicaps an individual’s ability to maintain a religious cultural identity.²⁶⁵ Instead she suggests that citizenship rights should be expanded to include “the recognition [and] accommodation of minority cultures,” an approach that deviates “from standard citizenship theory.”²⁶⁶

While I am largely sympathetic to Shachar’s position, it does not entirely escape the charge that “transformative accommodation” gives the civil judiciary unbridled discretion to decide if religious arbitrators have failed “to effectively respond to constituent needs.”²⁶⁷ Critics charge that Shachar’s approach “enables . . . parties to switch jurisdictions” merely because it is “in their best interests,” thereby preventing the arbitration proceeding from reaching any “meaningful conclusion.”²⁶⁸ One solution to this dilemma is to keep in place the choice to opt out, but to tie it to a more concrete standard. Instead of allowing either party to switch jurisdictions simply based on a civil court’s determination that the arbitrators “failed to provide remedies to the plight of the individual,”²⁶⁹ any opt-out option could be limited to those circumstances where there is a lack of convergence between the goals and standards of the applicable secular and religious laws.

The challenge with this approach, of course, is to fully draw out what is meant by convergence. Martha Minow suggests that the possibility of convergence exists when two sides can find “common ground without sacrificing principles.”²⁷⁰ For the purpose of determining when it may be appropriate for the civil judiciary to defer to the holding of religious tribunals, convergence may be said to exist

²⁶³ SHACHAR, *supra* note 262, at 123.

²⁶⁴ *Id.* at 85.

²⁶⁵ *Id.* at 20–22.

²⁶⁶ *Id.* at 22.

²⁶⁷ *Id.* at 122; see Helfand, *supra* note 2, at 1284 (arguing that “Shachar’s . . . approach . . . lacks . . . specificity”).

²⁶⁸ Helfand, *supra* note 2, at 1284.

²⁶⁹ SHACHAR, *supra* note 262, at 123.

²⁷⁰ Martha Minow, *Is Pluralism an Ideal or a Compromise?: An Essay for Carol Weisbrod*, 40 CONN. L. REV. 1287, 1300 (2008). Minow “argues that accommodations for minority groups by liberal democracies do not require a compromise when convergence between values can be achieved.” *Id.* at 1287. She goes on to explain that “[w]hen convergence cannot be achieved, compromise is not always wrong and can on occasion be justified to pursue social stability and to express competing principles embraced within the liberal democracy, but compromise cannot be justified if it involves capitulation to threats.” *Id.*

when comparable sets of religious and secular rules are rooted in concepts of equity and broadly share similar goals. Thus, in applying a convergence test, one would ask two questions: First, whether the religious standard, like the secular law, treats different groups equally; and second, whether the religious and civil standards share similar goals.²⁷¹ If the answer to both questions is yes, then deference to the religious tribunal in that instance may be appropriate.²⁷² However, if the answer to either question is no, then automatic deference is not appropriate, and the civil court overseeing the dispute should examine the underlying substantive claim raised by the parties to determine whether the arbitration award should be struck down.²⁷³

Some may argue that the public policy exception, which renders unenforceable any agreement where individuals waive rights designed to protect society at large, already encompasses what a “convergence” standard would seek to cover. There are, however, a number of ways the public policy exception fails to provide adequate protection in the arbitration setting. First, as a matter of law, it is unclear, under recent Supreme Court decisions, whether public policy remains a viable basis for vacating arbitration decisions. In its 2008 decision, *Hall Street Associates, L.L.C. v. Mattel, Inc.*,²⁷⁴ the Supreme Court held that the FAA “unequivocally tells courts to grant confirmation in all cases, except when one of the ‘prescribed’ exceptions [set forth in the statute] applies.”²⁷⁵ Under the FAA, judicial review of arbitration awards is limited to “where the award was procured by corruption, fraud, or undue means,” or some similar procedural irregularity.²⁷⁶ Since the public policy exception does not constitute one of the “prescribed exceptions” in the FAA, the decision implicitly jeopardizes its continued viability in the arbitration context. Indeed, subsequent judicial rulings certainly indicate that lower courts have interpreted *Hall Street* to mean that public policy is no longer an option for vacating arbitration awards.²⁷⁷

²⁷¹ Minow states that convergence exists when each side finds “common ground without sacrificing principles.” *Id.* at 1300.

²⁷² Minow proposes that the New York *get* statute’s treatment “of religious impediments to secular divorce exemplif[ies] convergence rather than either the state supplanting of religious norms or religious norms supplanting state rules.” *Id.* at 1297.

²⁷³ It is important to acknowledge at the outset that determining what constitutes convergence will not always be easy, especially when the religious rules are complex, subject to debate by experts, and unfamiliar to the civil courts.

²⁷⁴ 552 U.S. 576 (2008).

²⁷⁵ *Id.* at 587.

²⁷⁶ 9 U.S.C. § 10(a) (2012); see also *Hall Street*, 552 U.S. at 582 (“Section 10 [of the FAA] lists grounds for vacating an award, while § 11 names those for modifying or correcting one.”).

²⁷⁷ See, e.g., *DCR Constr., Inc. v. Delta-T Corp.*, No. 8.09-CV-741-T-27AEP, 2009 WL 5173520, at *6 (M.D. Fla. Dec. 30, 2009) (holding that the public policy exception is no longer a basis for judicial review of arbitration awards); *LeFoumba v. Legend Classic Homes, Ltd.*, No.

Second, the *mahr* decisions, particularly those centering around issues of comity, demonstrate that courts can apply public policy standards with too much flexibility, resulting in a great deal of inconsistency and confusion. In an effort to reach fair results, courts appear more willing to strike down a *mahr* provision on public policy grounds if drawing the parallel with a prenuptial agreement will deprive the wife of any meaningful marital property,²⁷⁸ but will readily uphold the validity of the *mahr* as a premarital agreement in the absence of a significant estate, so that the wife may retain minimal economic security.²⁷⁹ By contrast, a convergence standard will permit the courts less flexibility and obligate them to more objectively measure the difference between the goals and standards of a religious instrument and its secular counterpart.

Third, some scholars feel that irrespective of the Supreme Court's pronouncements on the public policy exception, "religious arbitral awards should be enforced even when they violate public policy."²⁸⁰ Otherwise, they propose, religious arbitration will lose its effectiveness as an "efficient, fair, and relatively inexpensive" alternative to the courts.²⁸¹ While this perspective is troubling because completely restricting the courts' ability to review arbitration awards in violation of the public's interest could jeopardize many important societal interests, it is possible that some of the concerns of these scholars will be alleviated if a tightly drawn and more objective "convergence standard" is applied.

A specific example might better illuminate this point. Under Jewish law, the "principle of *Hasagath Gevul* (literally 'encroaching on the border') . . . prohibits an individual from opening a second business identical to an existing business in such close proximity that doing so would lead to the financial ruin of the existing business."²⁸² Thus, Rabbinical courts may often find themselves in conflict with civil antitrust standards in the United States because under the

14-08-00243-CV, 2009 WL 3109875, at *2 (Tex. App. Sept. 17, 2009) (overruling a complaint, finding the public policy exception no longer available under the FAA).

²⁷⁸ See, e.g., *In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863, 865 (Ct. App. 2001); Chaudhary v. Ali, No. 0956-94-4, 1995 WL 40079, at *1-2 (Va. Ct. App. Jan. 31, 1995).

²⁷⁹ See, e.g., *Akileh v. Elchahal*, 666 So. 2d 246, 248 (Fla. Dist. Ct. App. 1996).

²⁸⁰ E.g., Helfand, *supra* note 2, at 1257 n.113, 1288-94.

²⁸¹ *Id.* at 1258 n.114 (quoting Joan Parker, *Judicial Review of Labor Arbitration Awards: Misco and Its Impact on the Public Policy Exception*, 4 LAB. LAW. 683, 711 (1988)) (internal quotation marks omitted); see also Harry T. Edwards, *Judicial Review of Labor Arbitration Awards: The Clash Between the Public Policy Exception and the Duty to Bargain*, 64 CHI.-KENT L. REV. 3, 34 (1988) (concluding that vacating arbitration awards based on the public policy exception will undermine the efficacy of arbitration proceedings); Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 823 (1996) (concluding that giving the public policy exception wide berth may risk courts "trespassing into the merits of the underlying dispute").

²⁸² Helfand, *supra* note 2, at 1258-59.

“encroachment” principle they may protect businesses even from fair competition if it is clear that such competition will be ruinous.²⁸³ In light of these differences, without a “convergence standard,” the civil judiciary would likely vacate arbitration awards by Rabbinical courts that deviated from civil antitrust standards.

A convergence standard, however, would ask whether secular and Jewish anti-competition laws are both rooted in concepts of equity and whether both approaches broadly share similar goals. It is readily decipherable that the principle of *Hasagath Gevul*, like secular antitrust standards, applies equally and neutrally to any party undertaking a business enterprise. It does not seek to award an undue advantage according to any economic criteria or to discriminate on any other basis. Moreover, anti-competitive standards under Jewish law share the same goals as civil antitrust laws, namely some level of protection against ruinous destruction of businesses that have invested significant resources in their enterprise. Thus, a choice-of-law provision between two businesses to arbitrate their disputes in a Rabbinical court according to the principle of *Hasagath Gevul* would have a much fairer chance of being upheld under a convergence standard than the current public policy analysis the courts employ.

By contrast, it will typically be much harder to justify deference to religious arbitration in family law disputes under the convergence standard.²⁸⁴ For example, as described above, under Islamic law, men are entitled to unilateral divorce by simply declaring three times “I divorce thee” without any obligation to provide notice or general due process rights to their wives.²⁸⁵ Any arbitral decision that upholds a divorce on these terms will fail the convergence test because it treats men and women differently—unlike secular divorce rules, which are rooted in a gender-neutral approach and treat men and women in the same manner.²⁸⁶ Similarly, because husbands retain almost complete control over divorce under Jewish law, arbitral awards relating to *get* disputes should also be subject to substantive review under a convergence test.²⁸⁷

²⁸³ See *id.* at 1258–60.

²⁸⁴ Minow poses the question: “[s]hould a religious tribunal supervise divorce and child custody determinations with results to be accorded state recognition?” Minow, *supra* note 270, at 1307. She answers with another question, wondering whether “such a tribunal [should] be allowed to perform such a role only if its norms match those of the larger state?” *Id.*

²⁸⁵ See *supra* text accompanying notes 221–25.

²⁸⁶ Of course, the search for equality in divorce law also has much further to go in this country, but the question before us is limited: Whether, for the purposes of the convergence test, the religious standard governing *talaq* deviates from the equity standards that shape its civil counterpart.

²⁸⁷ See discussion *supra* Part II.A. It is worth noting from the earlier discussion that it is much more challenging for courts to adjudicate a *get* dispute that turns on an interpretation of

Supporters of religious autonomy, who, at first, may resent the restrictions a convergence test would place on arbitral independence, might take comfort in the idea that an objective test would likely reassure some current skeptics and detractors and thus increase the circle of support for legal pluralism. Under a convergence standard, it appears that a significant degree of deference may be appropriate in religious disputes governing business arrangements, where the parties are more sophisticated than those involved in family disputes and where similar religious and secular standards and goals often prevail. Conversely, deference to religious tribunals may be unacceptable in areas such as family law if the underlying contract is grounded in rules that do not convey the same rights to men and women. In the end, putting together an objective measure for evaluating when automatic deference to religious tribunals is appropriate serves as the best method for advancing a secure, long-term role for religious arbitration, without risking violation of other fundamental rights. Moreover, a pluralistic, but flexible, system may reassure skeptics and encourage religious communities to take steps toward a more liberal interpretation of religious doctrine, thereby persuading a greater percentage of their members to choose to stay within the framework of religious arbitration.

CONCLUSION

Throughout the history of the United States, religious institutions and communities have striven for greater autonomy both by pushing for a broad reading of constitutional protections under the Religion Clauses and by fighting for the independence of alternative religious dispute resolution forums. Religious arbitration, which has historically found a very receptive home in the United States, has become the foremost battleground for championing the cause of legal pluralism and religious sovereignty. However, as this Article details, while it is hard to find fault in the basic idea that parties should be permitted to structure their relationships and adjudicate their disputes based on shared values, religious arbitration poses a number of unusual problems that renders its execution somewhat challenging.

The greatest difficulty presented by religious arbitration involves potential clashes between a number of religious laws and standards and certain civil protections, including many concerned with gender equality. Courts' abilities to deal with this conflict have been limited by two constraints. First, the Supreme Court's interpretation of the FAA,

the general language of the *ketubah*, in the absence of an express agreement outlining the parties' intent regarding the *get*.

directing the judiciary to defer to arbitration decisions, has prompted courts readily to accede to the holdings of religious arbitral bodies without paying much attention to the underlying substantive issues that characterized the original dispute. Second, a misreading of constitutional guidelines, including those set forth in *Jones*, has convinced some lower courts that going beyond procedural review of religious arbitral awards will result in Establishment Clause violations by impermissibly entangling the courts in doctrinal analysis.

The first part of this Article takes aim at the second constraint, namely, the general misreading of the Supreme Court's constitutional guidelines on the Religion Clauses, and demonstrates that the Supreme Court articulated the neutral-principles doctrine in *Jones for the very purpose* of allowing judicial review of disputes arising out of religious agreements. By championing the neutral-principles approach, the Court rejected the premise that judicial review of religious contracts violates the Establishment Clause²⁸⁸ and secured for group members, whose fundamental rights were at risk of being violated by discriminatory religious standards, continued access to secular courts to defend their civil liberties. The Court's resolution to keep open the gates of the judiciary also minimized the risk of re-inscribing into law through a back door discriminatory gender standards that have "only recently been ameliorated."²⁸⁹

In tackling the first constraint, this Article suggests that the Supreme Court's interpretation of the FAA, requiring blanket deference to alternative religious dispute resolution forums, is too broad and instead proposes a new methodology, the convergence test, for determining when automatic deference to religious arbitration is appropriate. The convergence test asks a two-fold question: Whether the religious standard underpinning the dispute treats different groups equally, and whether the religious and its corresponding civil standard share the same goals. If the answer to both of these questions is yes, the convergence test authorizes automatic deference to religious forums, but if the answer to either question is no, the test mandates that courts examine, pursuant to the neutral-principles doctrine, the underlying substantive claim raised by the parties to determine whether the arbitration award should be struck down. Overall, the convergence test is a more objective standard than current approaches, including the

²⁸⁸ In fact, the Supreme Court's concern ran in the opposite direction when it warned in *Jones* that attempts to enforce a singular rule of "compulsory deference" is much more likely to increase the risks of entanglement. *Jones v. Wolf*, 443 U.S. 595, 605 (1979). The high court's prescient words are amply borne out by decisions such as *Aflalo v. Aflalo*, 685 A.2d 523 (N.J. Super. Ct. Ch. Div. 1996), where the New Jersey Superior Court delved deeply into religious doctrine analysis to demonstrate that it cannot undertake an investigation into parochial issues. *See id.* at 526–31.

²⁸⁹ Estin, *supra* note 6, at 590.

public policy exception, for determining when to defer to religious arbitration. By limiting compulsory deference to religious forums to instances where there is convergence between the goals and standards of religious and secular laws, the test seeks to distinguish “questionable” arbitration awards from the routine and thus advance and secure a long-term role for religious arbitration without threatening group members’ access to the civil courts.

The third serious challenge religious arbitration poses concerns pressures contracting parties may feel from their communities to subscribe to the authority of religious forums. While this problem does not raise the same analytical dilemmas as a clash between fundamental rights or constitutional violations of the Religion Clauses, it embodies a myriad of important practical and procedural difficulties, whose resolution would be crucial to the success of any pluralistic architecture. Although it is beyond the scope of this Article to consider these issues in detail, it is worth raising some of the concerns. For example, since a dual jurisdiction framework will be more difficult to administer and understand, should the state put in place programs that will inform the parties of their respective rights under each system? Will women in certain communities have the independence (emotional and material) to exercise their civil rights, or will they be subject to community pressure to subscribe to religious arbitration?²⁹⁰ If group pressure is a serious issue, by instituting a dual jurisdiction system, will we merely create “ghetto communities” where women with certain religious affiliations simply will not enjoy the same rights as the majority of Americans? Can this hurdle be managed through outreach programs to the impacted communities, (as well as educational programs for parties to specific contracts), which over time will allow informed, free choices to be made? Should the state go further and provide some form of material backing, for example subsidized housing, to women who are abandoned by their communities and families after choosing a civil divorce to offer them some extra measure of independence? Finally, will opt-out schemes, along with state support for women who no longer wish to be bound by religious arbitration, make religious leaders defensive and more skeptical that the majority in America is exercising secular elitism?²⁹¹

As the survey of religious divorce cases reveals, mapping the boundaries of the judiciary’s authority over religious forums is not just a

²⁹⁰ See Shalina A. Chibber, *Charting a New Path Toward Gender Equality in India: From Religious Personal Laws to a Uniform Civil Code*, 83 IND. L.J. 695, 710 (2008) (arguing that basing reform of religious personal laws in India on a “right of exit approach” “is facially misleading because the majority of women in India do not enjoy the privilege of making choices about their rights” (internal quotation marks omitted)).

²⁹¹ See *id.* at 711 (arguing that a dual-jurisdiction system “provides minority groups with new fears of majority encroachment and loss of identity”).

matter of academic interest, but is vital to everyday concerns because so many Americans use religion as an anchor for their personal relationships. As a result, if Supreme Court guidelines are misinterpreted to deny parties to a religious agreement recourse to the civil judiciary, or if deference to religious arbitration becomes automatic in all circumstances, women's economic welfare, their ability to retain some form of custody of their children, and even their right to remarry can be significantly impacted. It is crucial, therefore, to continue to evaluate the boundaries between religious autonomy and other civil liberties. Perhaps, the lessons learned from this ongoing American experiment could even help countries searching for new constitutional models or those simply looking to undertake similar reform.