NEW YORK DIVORCE LAW AND THE RELIGION CLAUSES: AN UNCONSTITUTIONAL EXORCISM OF THE JEWISH GET[1] LAWS

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I. INTRODUCTION

> *The Torah's zealous guardianship of the family caused the Rabbis to build a protective fortress of marriage laws. Marriage is legally, morally, and socially binding; private, sacrosanct, and untouchable from the outside. That spirit accounts for the religious divorce laws. As the marriage is a personal agreement sanctified by Jewish law, the dissolution of marriage is a personal agreement sanctioned by the law of God and the Torah. The State has no authority in religious law, and it is religion that fosters and protects the institution of marriage. Of course Jewish law takes account the state law, but it does so as an additional requirement.*[2]

Under Jewish law, or halacha,[3] by which Orthodox Jewish worshippers abide, a married couple cannot be religiously divorced unless the husband writes and delivers to his wife a bill of divorce called a "get."[4] Under religious doctrine, however, a get is invalid if coercion is applied to force the

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[1]The Jewish term connoting a formal bill of religious divorce, as contrasted with a civil divorce decree. MAURICE LAMM, THE JEWISH WAY IN LOVE & MARRIAGE 47 (1980).

[2]*Id.* at 47 (emphasis omitted). Lamm states, "The Torah demands absolutely and unequivocally that marriage be terminated by formal religious divorce (get) . . . . With this arsenal of moral and legal weapons, Jewish tradition passionately and effectively defend[s] the institution of the family." *Id.* at 47-48.

[3]Peter Hellman, *Playing Hard to Get: Orthodox Jews and the Women Who Have Trouble Divorcing Them*, NEW YORK, Jan. 25, 1993, at 42. "Halacha" is the Jewish term for Jewish law. Edward S. Nadel, *New York's Get Laws: A Constitutional Analysis*, 27 COLUM. J.L. & SOC. PROBS. 55, 56 (1993). The term is spelled "halacha," "halakhah," and "halachah" depending upon the source and author. For purposes of this Comment, the term will be referred to by the first spelling unless a quoted author does otherwise.

[4]Marc Feldman, *Jewish Women and Secular Courts: Helping A Jewish Woman Obtain A Get*, 5 BERKELEY WOMEN'S L.J. 139, 142 (1990).

husband to deliver it.[5] Absent the receipt of a get, any subsequent remarriage by an Orthodox woman will not be recognized by her religion and, consequently, any children begotten to her by that religiously invalid marriage are considered to be bastards.[6]

The Jewish husband's veto power over Orthodox divorce, combined with the religious consequences that befall the wife who cannot receive one has precipitated its share of secular litigation within the State of New York.[7] Although there is a widely held belief that some change in the female spouse's power is long overdue,[8] there is raging debate as to how that change should be accomplished and over whether the secular government can constitutionally play any part in addressing the perceived inequities in light of the Religion Clauses of the First Amendment to the United States Constitution.[9] It is exactly this question that presents the contemporary legal issue that is the focus of this Comment.

In response to what she characterizes as a "fundamental inequity of Jewish law," one feminist Jewish author has written that "[t]he existence of agunot[10] is a crime against women, a disgrace to the Jewish community, and a violation of human rights that demands immediate remedy."[11] Other of the author's quotes, however, forcefully illustrate the First Amendment problems implicated by a secular court or legislature coming to the rescue. For instance, the author proclaims that the get problem is "a symptom of the systematic exclusion of women from power and authority in traditional Judaism" and that "[i]t points to the far-reaching work that will have to be done before women can define Jewish practice and values on an equal footing

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[5]Nadel, *supra* note 3, at 57 (footnote omitted).

[6]*See infra* notes 34-41 and accompanying text.

[7]*See infra* notes 69-118 and accompanying text.

[8]*See infra* notes 50-63 and accompanying text.

[9]The First Amendment provides, in pertinent part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

[10]The plural for "agunah," an agunot is the Jewish term used to describe a woman who has been unsuccessful in receiving a get from her husband. *See infra* notes 35-37 and accompanying text.

[11]Judith Plaskow, *Jewish Feminism, The Year of the Agunah*, TIKKUN, Sept.-Oct. 1993, at 52.

with men."[12] These statements draw attention to the fact that when women do finally achieve an equal footing with men in the realm of religious divorce, Jewish practice and values will necessarily have been amended. Is it then even remotely plausible that the accomplishment of this equal footing by secular laws, in conjunction with the aid of civil court enforcement, could withstand judicial scrutiny by the United States Supreme Court if and when the First Amendment issue finally makes it to that docket?

Part II of this Comment presents an overview of the religious rules pertaining to Orthodox Jewish divorce and introduces the problems facing women who are unsuccessful in receiving one.[13] Part III discusses the efforts that have been made by both Orthodox Jewish leaders and members to abate results of prevailing get doctrine.[14] Part IV includes an examination of New York's past and present handling of get related disputes by both the judiciary and legislature of that state.[15] Finally, Sections B and C of Part V contain a constitutional analysis of New York's methods from both an Establishment Clause and Religion Clause perspective, respectively.[16] Such analyses will suggest that certain New York domestic relation laws, both judicial and legislative alike, violate both of the Religion Clauses, particularly the Establishment Clause.[17]

II. AN OVERVIEW OF ORTHODOX JEWISH MARRIAGE AND DIVORCE

At the heart of an Orthodox Jewish family lies a sanctity imparted by Jewish law[18] which governs creation of the religiously consummated liaison of marriage, as well as its dissolution. The jewish orthodox view the marital

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[12]*Id.* at 52.

[13]*See infra* notes 18-49 and accompanying text.

[14]*See infra* notes 50-66 and accompanying text.

[15]*See infra* notes 68-123 and accompanying text.

[16]*See infra* notes 132-237.

[17]*See infra* Part V.

[18]"Jewish law has been in existence for over two thousand years. During this time [it] has governed all aspects of life in the Jewish community." Felicia Moskowitz, *The Plight of the Aguna*, 4 TOURO J. TRANSNAT'L L. 301, 301 (1993).

enterprise with the highest reverence,[19] intending that Jewish law regulate the spiritual aspects of both marriage[20] and divorce.[21]

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[19]For example, respected tradition requires that Jewish couples "fast on the day of their wedding as an indication of the spiritual importance of marriage." MY JEWISH WORLD 100 (Rabbi Dr. Raphael Posner ed., 1975). Cognizance of the value placed upon marriage in the first instance is significant for purposes of this Comment to the extent that it provides a basis for understanding the importance of religious rules surrounding Orthodox religious divorce and First Amendment concerns.

[20]"Jewish law regarding the family, and most specifically marital relations, is all encompassing and all embracing. More than mere legalities are involved for halakhah [Jewish law] programs the structure of the family, and at once urges the distinct, individual, humane response of each partner, of each couple, to thus live out the sublime beauty of the Jewish home as was envisaged by the Torah." REUVEN P. BULKA, JEWISH MARRIAGE, A HALAKHIC ETHIC xix (Norman Lamm ed., 1986).

Literature concerning Jewish Orthodox marriage is rich with reference as to how Jewish life is "permeated with religious consciousness" and how every individual act is to be undertaken with appropriate regard for religious divinity. MOSES GASTER, THE KETUBAH 13 (1974). For example, dating is considered desirable only as a means of attaining the ultimate goal of marital status which allows an individual to spiritually "complete oneself." *Id.* at 5. "Just as the rabbis realized the difficulties inherent in successfully matchmaking, they understood the problem of maintaining the marriage relationship. Jewish law, therefore, carefully defined the rights and obligations of both [parties] in order to avoid the fears and uncertainties which accompany an undefined relationship." *Id.* Thus, Jewish law specifically seeks to guide males and females toward fulfilling marital obligations and sets forth religious law that facilitates that task.

[21]Jewish literature conveys the religious condemnation of divorce and the customary rabbinical practice of encouraging peace between a husband and wife contemplating the termination of their marriage. BULKA, *supra* note 20, at 137. The endeavor to bring about peace between a troubled marital couple has been characterized as the "loftiest of noble deeds" to which a rabbi can aspire. *Id.* In fact, it was specifically in furtherance of such efforts that the Jewish faith embraced the requirement of the "ketubah," or marital contract, and the inherent monetary penalties it carries as punishment for divorce if one should be sought. *Id.* at 195-97. For an explanation and discussion of the Jewish ketubah, see *infra* notes 22-25 and accompanying text.

Most significant for purposes of this Comment is that Jewish law reserves the right to govern religious divorce, such divorce constituting the only divorce of consequence in the eyes of the Jewish faith. LOUIS M. EPSTEIN, THE JEWISH MARRIAGE CONTRACT 1 (Jacob B. Agus et al. eds., 1973). "Ancient law is . . . true to the conception . . . that marriage is a voluntary transaction between two parties, a male and female. [Thus], Jewish law . . . does not recognize a decree of divorce of any court without the act of divorcing carried out by the husband. It is the husband who divorces, *not the court*." *Id.* (emphasis added). The intent that adherence to religious doctrine be the sole procedure for dissolving a religiously consummated marriage is easily discernible from literature and case law. *See, e.g.*, Nadel, *supra* note 3, at 57 ("A civil divorce has no effect upon the couple's marital status."); Hellman, *supra* note 3, at 42; Plaskow, *supra* note 11, at 86

The religious solemnity embracing Jewish marriage and divorce is manifested by the Jewish marriage contract, or "ketubah."[22] The provisions of the ketubah, a document historically drafted and instituted as protection for the Jewish bride, function to impose financial obligations upon the husband throughout the course of the marriage.[23] More significant, however, is the ketubah's imposition of financial penalties upon the husband in the event that the couple should seek termination of the marriage,[24]

("Orthodox rabbis argue that, for the sake of Jewish unity, all marriage and divorce procedures should adhere strictly to Halacha."); Kaplinsky v. Kaplinsky, 603 N.Y.S.2d 574 (N.Y. Sup. Ct. 1993) ("The former husband continually acknowledged that [his] giving of a get was the only acceptable way to a effect a Jewish divorce . . . .").

[22]The ketubah is a document presented to the bride by her future husband in which certain matrimonially related obligations are imposed, primarily upon the latter party. IRWIN H. HAUT, DIVORCE IN JEWISH LAW AND LIFE 7 (1983). For reference to the traditional textual wording of the ketubah, see HAUT, *supra*, at 8-9. For a discussion of civil enforcement of the promises contained in the ketubah, see *infra* notes 88-108 and accompanying text.

[23]The primary obligations owing from a husband to his wife include the providence of maintenance, clothing, and sexual intercourse. LAMM, *supra* note 1, at 197-98. Additionally, a husband pledges to bury his wife upon her death, support the couple's unmarried daughters out of his estate subsequent to his own death, and care for his wife in the event of illness. *See* Barbara J. Redman, *Jewish Divorce: What Can Be Done In Secular Courts To Aid The Jewish Woman?*, 19 GA. L. REV. 389, 393 (1985) (citing MAIMONIDES, MISHNAH TORAH, *Hilchot Ishut* XII:2). The aforementioned obligations emanate from Biblical law. *Id.*

The ketubah provisions attending the wife's duties to her husband permit him to enjoy her earnings, anything she comes to possess, and a life interest in her estate, as well as the status of heir to her estate upon her death. *Id.*

[24]LAMM, *supra* note 1, at 197-98. "'Marriage contract' is not an entirely accurate translation for 'ketuba' since the ketubah is important primarily for delineating the duties of the husband and wife after the marriage has ended." *Id.* The [K]etubah actually delineates the amount of money the husband will be required to pay the wife upon his death or divorce. Feldman, *supra* note 4, at 141. It should be noted that it is not necessarily the signed written contract that breathes religious life and spiritually imposed obligations into the marital relationship. Biblical and rabbinical law, as distinguished from religious contract law, impose many of these same obligations irrespective of whether any document is actually executed or transferred. *See id.*; Redman, *supra* note 23, at 393. Thus, by the mere act of participating in the Orthodox matrimonial ceremony, the marital partners become bound to certain religiously imposed obligations. For a discussion of modern clauses in religious marital contracts imposing important non-economic provisions enforceable upon divorce, see *infra* note 61 and accompanying text.

again, evidence of the religion's disdain for divorce.[25]

Although a literal reading of the biblical passage relied upon as authority for seeking a religious divorce might initially lead a reader to an opposite conclusion,[26] the process of procuring an Orthodox Jewish divorce is regulated by strict religious doctrine which demands the same level respect commanded by the religious rules pertaining to mate selection and marriage itself.[27] A Jewish marriage can only be terminated in one of two ways, one being by the death of a spouse and the other pursuant to the receipt of a Jewish bill of divorce, or get.[28] While the latter means of obtaining a

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[25]*See supra* note 21 and accompanying text.

[26]Jewish law cites to a verse of Deuteronomy as the divine authority for terminating a marriage. The verse provides, in pertinent part:

> When a man takes a wife and marries her, if it then comes to pass that she finds no favor in his eyes for he has found *something unseemly* in her, he shall write her a document of divorce and give it to her hand, and send her out of his house.

Nadel, *supra* note 3, at 56-57 (quoting Irving Breitowitz, *The Plight of the Agunah: A Study in Halacha, Contract, and the First Amendment*, 51 MD. L. REV. 312, 313 n.2 (1992) (quoting Deuteronomy 24:1 (emphasis added))).

[27]In fact, "[t]he procedure for divorce is much more complicated than the procedure for marriage, perhaps consistent with the notion that husband and wife uniting is natural, husband and wife separating is unnatural, and therefore complicated. The granting of a divorce is a painstaking process, itself affirming the sanctity of marriage even at its dissolution." BULKA, *supra* note 20, at 139.

Although technically speaking, the only outside aid required for execution of a divorce between two willing parties is the presence of two witnesses, a rabbi or rabbinical court, called a Bet Din, is effectively required to ensure that a multitude of technical divorce formalities are properly abided by. *See* Moskowitz, *supra* note 18, at 301 ("The execution of the get is a private act which does not require the participation of a rabbi."); Feldman, *supra* note 4, at 139 (explaining that "[t]oday . . . rabbinical supervision is almost a necessity"); HAUT, *supra* note 22, at 20; Debbie Eis Sreter, *Nothing to Lose But Their Chains: A Survey Of the Aguna Problem*, 28 U. LOUISVILLE J. FAM. L. 703, 703 (1989) ("Since the procedural minutiae involved in the execution and delivery of the get are complex and technical, it is virtually impossible to divorce without the aid of the rabbinical court, or Bet Din.").

[28]HAUT, *supra* note 22, at 17; *see also* Minkin v. Minkin, 434 A.2d 665, 667 (N.J. Super. Ct. Ch. Div. 1981) (discussing an orthodox rabbi's testimony that a marriage is severable only by death of a spouse to the marriage or securing of a get); Richard Zuber, *Getting The "Get": Obtaining A Jewish Divorce In Colorado*, 20 COLO. LAW. 907, 907 (1991) (citations omitted). A get is not required in the Reform tradition of Judaism. LAMM, *supra* note 1, at 48.

divorce is potentially a simple and somewhat speedy procedure, technical application of Jewish law can cause the marital status of the participants to remain indefinitely unresolved[29] since a get can only be given by a husband to his wife.[30]

Exacerbating what is, without doubt, an inequitable distribution of power between men and women with respect to religious divorce is the religious requirement that a get be given solely as a result of the husband's free will and never in response to coercion.[31] Hence, the act of granting a religious bill of divorce lies completely within the discretion of the husband.[32] This facet of Orthodox Judaism has severe religious ramifications.[33]

If a get should be refused by a husband in a particular case, a myriad of vexing religious consequences ensue for the wife, irrespective of her procurement of a civil divorce decree.[34] According to Jewish law, a woman who fails to obtain a get from her husband is labeled an "agunah," which means "chained woman" in Hebrew.[35] Thus, as can be inferred by the

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[29]*See* Sreter, *supra* note 27, at 705 ("The obstinacy of some men to endure imprisonment rather than to grant the get dramatically illustrates the depth of the problem."); Zuber, *supra* note 28, at 907 ("[P]otentially disastrous consequences exist [even] today for a Jewish wife should she not receive a get from her husband following a civil divorce . . . .").

[30]HAUT, *supra* note 22, at 18. Religious law provides that a husband must deliver the religious bill of divorce to the wife, thus a wife cannot divorce her husband without his cooperation. *Id.; see also* Plaskow, *supra* note 11, at 52; Moskowitz, *supra* note 18, at 301; Hellman, *supra* note 3, at 42.

[31]HAUT, *supra* note 22, at 19. If a husband is in any way coerced to provide his wife with a get, the resulting bill of religious divorce is invalid. Nadel, *supra* note 3, at 57. However, the seemingly absolute right of a husband to divorce is often limited by various fictions employed to reach more equitable results. *See* HAUT, *supra* note 22, at 19-21; *see also infra* notes 57-63 and accompanying text.

[32]Redman, *supra* note 23, at 389 (characterizing this discretion as a "religious concentration of power in the hands of the husband").

[33]*See infra* notes 34-49 and accompanying text.

[34]Moskowitz, *supra* note 18, at 303.

[35]*See* Hellman, *supra* note 3, at 42.; Sreter, *supra* note 27, at 703 (citing G. HOROWITZ, THE SPIRIT OF JEWISH LAW 292 (1953)); Plaskow, *supra* note 11, at 52. The word is spelled both "agunah" and "aguna" depending on the source and/or author. This Comment will refer to the word by the former spelling unless a quoted author does

word's translation, the woman who is denied a get, even though civilly divorced, remains religiously married to her Orthodox husband indefinitely.[36] From a religious standpoint, such status carries socially damaging consequences.[37] Due to her religiously implacable marital status, she commits adultery if she cohabits with, or marries, another man.[38]

In addition to the direct consequences that fall upon a wife who fails to obtain a get, are the consequences that impose themselves upon any children subsequently begotten by her in the course of a second, religiously invalid marriage.[39] The consequences to such children include the attachment of an outcast status within the religion and an inability to marry anyone other than another outcast child.[40] Moreover, while an agunah may be relieved of her status upon eventual receipt of a get, nothing can alleviate the social and religious stigma that attaches itself to a child born into a

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otherwise.

[36]Nadel, *supra* note 3, at 60 (citations omitted); *see also* Golding v. Golding, 581 N.Y.S.2d 4, 5 (N.Y. App. Div. 1992) ("Since a wife's ability to obtain a Get is almost completely dependent upon the acquiescence of her husband, an observant 'wife is held hostage to a dead marriage . . . unable to marry or date.'"); Redman, *supra* note 23, at 393 ("The anomalous situation thus arises in which the parties are still married under religious law but divorced under secular law.").

[37]*See infra* notes 38-41 and accompanying text.

[38]Nadel, *supra* note 3, at 61 (citing Breitowitz, *supra* note 26, at 324); *see also* Sreter, *supra* note 27, at 703. The barrier is only recognized within the religion itself and a wife who fails to obtain a get may enter a marriage recognized by the secular legal system so long as a civil divorce is attained. *Id.*

In addition to the barrier against remarriage without a get is a restriction forbidding the wife to religiously remarry her second secular husband even following her receipt of a get from the prior husband if she secularly married that husband prior to receiving a get. Redman, *supra* note 23, at 392 (citing J. BLEICH, CONTEMPORARY HALAKHIC PROBLEMS, 150, 154 (1977)).

[39]*See infra* notes 40-41 and accompanying text.

[40]Moskowitz, *supra* note 18, at 304. The child of an agunah is considered "mamzer" and any children of mamzerim are likewise under the same restraints as their own mamzerim parents. *Id.*; *see also* Sreter, *supra* note 27, at 703. The status of mamzer only attaches to children of a second marriage which is considered to be a tainted union despite civil dissolution of the prior marriage.

religiously invalid marriage.[41] On the other hand, the husband who withholds a Jewish divorce from his former wife may cohabit with another woman without committing adultery,[42] and any children born to him thereafter are not branded social outcasts.[43]

Acknowledgement of the forementioned religious and social consequences compels the conclusion that the failure to obtain a get impacts nearly exclusively upon the wife.[44] The perception of an apparent inequity[45] in social power between the two sexes under Orthodox Jewish divorce law is exacerbated by examination of the practical effects of such religious rules. For instance, it is not atypical for husbands to exercise their "veto power" over a religious divorce for reasons unrelated to Orthodox religious belief or conversion to another religion, more arguably acceptable bases for withholding the bill of divorce.[46] Husbands commonly withhold

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[41]This mamzerim, or illegitimate status, not only attaches to children of the agunah, but to their children as well. Zuber, *supra* note 28, at 907 (citing Pfeffer & Pfeffer, *The Agunah in American Secular Law*, 31 J. OF CHURCH AND STATE 487, 489 (1989)). The status is continually passed down to succeeding generations. *Id.* It is no doubt these religious tenets that command female Orthodox wives to refrain from remarriage and childbearing even when doing so is contrary to their wishes. Such has been noted in commentary. *See, e.g.*, Plaskow, *supra* note 11, at 86 ("[W]hile Orthodox rabbis are always bemoaning intermarriage and low birth rates, their failure to free *agunot* is keeping large numbers of traditional women who would like to have children, or additional children, from remarrying."); Sreter, *supra* note 27, at 706 ("[F]or those individuals wasting their childbearing years, barred from remarriage and ensnared in vicious conflict with vindictive husbands, the anguish is real and deserving of redress.").

[42]LAMM, *supra* note 1, at 146-47.

[43]*Id.* at 91; *see also* Sreter, *supra* note 27, at 704 (citing HOROWITZ, *supra* note 35, at 262).

[44]Nadel, *supra* note 3, at 55.

[45]"The very existence of *agunot* as a category of person within Judaism is an outcome of the fundamental power imbalance in Jewish marriage." Plaskow, *supra* note 11, at 52. In proffering her argument that the status of agunot is a "crime against women" necessitating immediate remedy, Judith Plaskow declares that the get dilemma is merely one result of a "larger religious system that is . . . entirely under male control." *Id.* "Any situation in which power is so profoundly unbalanced invites the oppression of the powerless and allows the powerful to define the situation in terms that blame the victim." *Id.* at 53; *see also supra* notes 10-12 and accompanying text.

[46]*See infra* notes 47-49, 109 and accompanying text.

a religious divorce for reasons of pure spite and malice.[47] Most significant is the affinity for Orthodox husbands to employ their religiously based discretion to secure highly beneficial property concessions and child custody rights in secular divorce proceedings,[48] as well as to extort otherwise

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[47]Redman, *supra* note 23, at 392 (citing Bleich, *Jewish Divorce: Judicial Misconceptions and Possible Means of Civil Enforcement*, 16 CONN. L. REV. 201, 201-02 (1984)); *see also* Scholl v. Scholl, 621 A.2d 808 (Del. 1992). In addressing the novel issue of whether a secular court could require the tendering of a second get in light of allegations that the initially secured get would be unacceptable to an Orthodox branch of Judaism, the Family Court of Delaware specifically noted the husband's uncooperative behavior throughout the entirety of the divorce litigation. *Id.* at 812-13. Rabbinical testimony that the husband purposely secured a get that would be unacceptable to the Orthodox branch was offered. *Id.* "The Rabbi stated that Husband said to him that he would not make it easy for Wife to obtain a get and that he would like to make her suffer since she made him suffer." *Id.* at 813.

[48]*See Scholl*, 621 A.2d at 808; *see also* Hellman, *supra* note 3, at 42 ("Civil matrimonial courts make rulings, and killer divorce lawyers are held in more awe than white-bearded sages. Often, the only way a woman can wrangle a get is to offer her husband a tidy sum, but sometimes even cash can't buy a *get* . . . ."). Thus, Hellman concludes that "[a] get has become a commodity with a price on it like any other." *Id.* at 44.

Plaskow similarly argues that "women are forced to give up important rights in order to gain freedom . . . . In cases where a woman's husband refuses her a get, she can find herself in a nightmare realm, bargaining away her means of survival and occasionally even custody of her children." Plaskow, *supra* note 11, at 52.

Two New York cases present particularly illuminating depictions of the extent of power wielded and forms of battles waged by Jewish Orthodox husbands in civil settlement disputes. In Perl v. Perl, 512 N.Y.S.2d 372 (N.Y. App. Div. 1987), a Jewish husband, who initially withheld a get from his religiously practicing wife who he knew would not remarry or bear children without the get, was successful in obtaining a civil divorce settlement requiring his wife to deliver to him — (1) all securities jointly owned by the parties at the time of settlement; (2) payment of $35,000 to compensate him for jointly held securities which she had previously sold; (3) payment of $30,000 on promissory notes guaranteed by the wife's uncle; (4) a deed conveying her one-half interest in their marital home; (5) title to her automobile and (6) her engagement ring and other personal jewelry. *Id.* at 374.

In Golding v. Golding, 581 N.Y.S.2d 4 (N.Y. App. Div. 1992), a New York court was faced with a plaintiff wife's allegations that her Jewish husband threatened to withhold a get unless she made concessions of everything he wanted for purposes of their civil settlement agreement. *Id.* at 5. Mrs. Golding signed the initial settlement document that the spouses' rabbis drafted without even understanding its Hebrew contents. *Id.* Later that same day, another document containing more concessions than originally requested by her husband was presented to her for signing. *Id.* She failed to sign this document. *Id.* Approximately one week later, Mrs. Golding attended yet another meeting with her husband apparently convened under the pretext that a Jewish divorce was to be arranged.

unobtainable concessions in general.[49]

III. RELIGIOUSLY AFFILIATED REACTIONS TO THE PROBLEM

Reaction to what commentators have appropriately termed the "Plight of The Agunah"[50] has emerged in various forms and forums.[51] As might be anticipated, much of this reaction has been generated from within the Orthodox Jewish community itself.[52] Individual members of the Orthodox faith have organized and committed themselves to protesting and assuaging the predicament of agunot.[53] In fact, a commonly resorted to and successful

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Id. Rather, her husband offered yet more papers for her signing, again threatening to withhold the get if she failed to comply with his newest settlement demands. *Id.* The *Golding* court concluded that Mrs. Golding had finally signed the ultimately concluded Hebrew settlement "because she was petrified of the prospect of not receiving her Get." *Id.* For additional discussion of the *Golding* case, see Hellman, *supra* note 3, at 44.

[49]*See, e.g.*, Hellman, *supra* note 3, at 42 (discussing how a Brooklyn Orthodox wife whose husband had dragged her, holding onto his automobile, down a block causing her leg to be broken, was only able to obtain a get by conveying $15,000 to her husband and agreeing not to pursue assault charges for the automobile incident).

[50]*See, e.g.*, Moskowitz, *supra* note 18, at 301; Sreter, *supra* note 27, at 704; Hellman, *supra* note 3, at 42.

[51]Reaction has manifested itself in religious doctrine, newspapers, associations and organizations as well as the secular legislative and judicial arenas. *See* Moskowitz, *supra* note 18, at 304. "The *aguna* problem has prompted many *halakhic* authorities over the years to propose various methods for relief of the *aguna*. The solutions proposed have been suggested by the Mishna, Reform, Reconstructionist, Conservative and Orthodox communities as well as legal scholars and American courts." *Id.*; *see also* Feldman, *supra* note 4, at 144 ("[T]he situation of the agunah has drawn the attention of secular courts and lawmakers."); Nadel, *supra* note 3, at 62 ("In recent years, the American legal system has begun to recognize [the] situation, and state courts and legislatures have taken steps to remedy it.").

[52]*See infra* notes 53-63.

[53]In his article, *Playing Hard To Get*, Hellman notes the increasing tendency of Jewish Orthodox women to take public steps to defend fellow females made hostage to their religious marital status by recalcitrant husbands who withhold a get. Hellman, *supra* note 3, at 42. The mobilization of community support on behalf of agunot has proven to be a significant incentive for husbands to tender the bill of divorce. *See infra* note 54 and accompanying text.

means of encouraging a resistant husband to bestow the requested bill of divorce requires his ostracism from the community, an enterprise in which community participation is both indispensable and readily forthcoming.[54]

Contributions to the crusade on behalf of Jewish wives have not been limited to the efforts of devoted lay persons.[55] Sympathetic rabbis have likewise extended their efforts by accomplishing public awareness of the problem and by encouraging the aforementioned community ostracism.[56]

Orthodox Jewish followers are widely participating in organizations and associations solely dedicated to the mission of securing relief for the agunot. *See* Plaskow, *supra* note 11, at 87. "[D]esperate *agunot* and their supporters are becoming more militant. Agunah, Inc., which is an Orthodox feminist group, has organized demonstrations at Agudath Israel conferences. It and G.E.T. (Getting Equitable Treatment), another organization for *agunah* relief, have picketed the homes, businesses, and synagogues of men who are withholding *gittin* from their wives." *Id.* Also fighting on behalf of the agunot is the ICAR or International Committee for Agunah Rights, whose strategy is to persist in advocating, and hence eventually, impel religious formulation of a halachic solution to the problem that "halachic Jews worldwide will find acceptable." *Id.*

[54]The impetus for such ostracism, whereby community members refrain from social interaction with a husband who withholds a get, derives from a Bet Din's application of pressure to do so. *See supra* notes 61-63 and accompanying text.

Despite its appeal and seeming potency, ostracism from one Jewish community is not always effective in light of the husband's opportunity to transfer to another religious congregation where he will be permitted to teach and even serve as a Rabbi. Plaskow, *supra* note 11, at 86.

[55]*See infra* notes 56-63 and accompanying text.

[56]A particularly noteworthy response to the inequities of Jewish divorce has manifested itself in the form of one rabbi's weekly newspaper column appearing in *The Jewish Press* newspaper entitled, "Chained: The Agunah Saga." The Jewish Press is said to be "[t]he nation's 'largest Anglo-Jewish weekly newspaper', with a circulation of more than 100,000." Hellman, *supra* note 3, at 42. Rabbi Mendel Epstein's column, displayed with prominence within a decoratively symbolic border of chains, acquaints readers with actual tales of Jewish wives who remain incapable of remarrying due to their agunah status. Often the column focuses upon get litigation and the problems encountered by Jewish women in securing the get or obliging their husbands to merely appear before the Jewish judicial tribunal, or Bet Din, to discuss the granting of a get. The column also lists names of Jewish men who refuse to deliver a get, an effort calculated to achieve the goals of embarrassing and persuading such husbands to deliver the divorce. Upon awareness of their refusal to deliver the get, "[t]heir peers then place the men in 'minor excommunication'. While they are in this state, other Jews may not enter their homes, eat with them, or pray with them." *Id.* at 45.

Another example of religious leaders' contemporary involvement in the campaign to alleviate the problem is the New York Board of Rabbis' enlistment of public support for the granting of religious divorces and its encouragement of sanctions against spouses who

Rabbinical attempts to enjoin the plight of devout Jewish wives is far from a new trend, however.[57] Whether outwardly acknowledged or not, rabbis have long been engaged in efforts to liberate Orthodox wives from the harsh results of the get laws.[58] Since historical times, rabbinical courts[59] have conceived and enforced arguments and fictions intended to alleviate the strife of agunot.[60] One of the most commonly employed fictions involves

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refuse to extend their cooperation toward the arrangement of such divorces. The Board is composed of Orthodox, Reform, and Reconstructionist members. Sreter, *supra* note 27, at 706 (citing McQuiston, *Jewish Divorce Law Plagues Wives*, N.Y. TIMES, December 28, 1986, § 1, at 35, col. 4.).

[57]*See infra* notes 58-63 and accompanying text.

[58]*See infra* note 60 and accompanying text.

[59]A religiously recognized judicial tribunal comprised of a Rabbi and two or more assistants having jurisdiction in Jewish law matters is called a Bet Din. *See* Scholl v. Scholl, 621 A.2d 808, 810 (Del. 1992). Under Orthodox religious tenet, when two parties harbor a disagreement they are to refer the matter disputed to a the Bet Din who will render an order or devise a solution. Redman, *supra* note 23, at 394 (citations omitted).

[60]"The plight of agunot is one which has historically concerned the sages and the community." Sreter, *supra* note 27, at 704. For example, rabbis of the 14th century proclaimed that provisions of the Talmud itself provided support for a rabbinical declaration that a marriage was void *ab initio* (from its inception) thereby altogether alleviating a wife of the need to seek a religious divorce. Sreter, *supra* note 27, at 704-05 (citing Shiloh, *Marriage and Divorce In Israel*, 5 ISRAEL L. REV. 479, 497 (1970) (citations omitted)). This method of avoiding a marriage was revived in 1884 by Rabbi Michael Weil of France. *Id.* at 705. The Talmudic axiom said to support avoidance of the marriage was that "[h]e that marries a wife does so on the strength of Rabbinical precepts and the Rabbis may forfeit his marriage [if he contravenes such precepts]." *Id.* A retroactive cancellation of the marriage was authorized if the Rabbi believed a husband's behavior to be immoral or harmful to the community. *Id.* at 704. The main thrust of this argument was that in cases where the spiritually supportive basis of the marriage was lacking, the religious sanction of such marriage could be dissolved as if it had never existed. Moskowitz, *supra* note 18, at 308.

The aforementioned practice, as well as an eventual expansion of it that made pronouncements of nullity binding upon the Bet Din, was ultimately abandoned due to opposition by extreme Orthodox branches. Sreter, *supra* note 27, at 705; Moskowitz, *supra* note 18, at 307-08. For apparent reasons, it is not uncommon for more traditional branches of Orthodoxy to disapprove of efforts to alleviate the effect of the get laws. Such disapproval stems from the fear that alleviation in fact constitutes modification or eradication of a particular religious tenet from the religion, an often realized fear. Traditional Orthodoxy's opposition to alleviation efforts is at the heart of the currently waging debate as to whether the state of New York's divorce laws are unconstitutional. *See* Plaskow, *supra* note 11, at 86. In referring to New York's domestic relations law, the

the extraction of constructive consent, whereby a Bet Din applies or encourages various means of coercion against a husband until he complies with his wife's request for a get.[61] Although this seemingly violates the

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author explained that while N.Y. DOM. REL LAW § 253 "has helped a number of women . . . some rabbis in Agudath Israel, a right-wing Orthodox organization, are seeking its repeal on the grounds that it results in a coerced get, which is halachically invalid." For a detailed discussion and analysis of § 253, see *infra* Parts III and IV.

As might be expected, the consistently recurring problem abounding proposed resolutions to help the agunot involve the element of compulsion utilized by such resolutions in procuring the get. It must be remembered that "Halakha requires that the get be drafted and delivered by the husband without coercion. Free will is essential to the validity of the get [and] . . . [t]he bill of divorce executed under forms of duress or compulsion not permitted is invalid." Moskowitz, *supra* note 18, at 310.

Both Reform and Reconstructionist Judaism branches have offered their own solutions to a husband's refusal to deliver a get to his wife. *See id.* at 305. The Reform branch has posited that divorce is purely a secular matter and that a secular divorce is religiously valid even despite the failure to obtain a get. *Id.* (citing Bernard Mehlman & Rifat Sonsino, *A Reform Get: A Proposal*, 30 J. REFORM JUDAISM 31-36 (1983)). The Reconstructionists merely dismissed the problem by blatantly ignoring the religious requirement that a man give the get of his free will and allowing a wife to deliver the get to her husband. *Id.* However, due to their obvious divergence from the aforementioned requirement that a get be uncoerced, these solutions were rejected by Conservative and Orthodox branches as "halakhically unsound." *Id.*

Another, perhaps more creative, method of ensuring delivery of religious divorces from husbands initially unwilling to deliver them was based upon the doctrine of constructive consent. *See infra* notes 61-63 and accompanying text.

For a detailed discussion of the religiously proffered solutions to the agunot dilemma, see Moskowitz, *supra* note 18, at 304-315.

[61]Feldman, *supra* note 4, at 144; *see also* Nadel, *supra* note 3, at 59-60 (citations omitted). In 1954, the addition of a clause, by a Conservative wing of American Judaism, to the previously existing version of the ketubah bestowed a significant power upon the Bet Din. Feldman, *supra* note 4, at 141-42; Nadel, *supra* note 3, at 66. The clause essentially provides:

> As evidence of our desire to enable each other to live in accordance with the Jewish law of marriage throughout our lifetime, we, the bride and bridegroom, attach our signatures to this Ketubah, and hereby agree to recognize the authority of the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America, or its duly appointed representatives, as having authority to counsel us in the light of the Jewish tradition which requires husband and wife to give each other complete love and devotion, and to summon either party at the request of the other, in order to enable the party so requesting to live in accordance with the standards of Jewish law of marriage throughout his or her lifetime. We authorize the Beth Din to impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decision.

religious requirement that a get be given of a husband's free will, rabbis advance a fiction that the uncooperative husband truly desires to comply with his religious duty and that it is only on account of an "evil disposition" that he withholds the get.[62] Under this fiction, duress is only applied to defeat the evil and when the husband consequently delivers his "consent," it is said to be done of his own free will.[63]

It is clear that the Jewish Orthodox religion has, itself, recognized the substantial problems attending its own divorce laws.[64] It is also clear that religiously proposed solutions to these problems have not, for one reason or another, proven to be highly successful.[65] However, one distinction between these solutions and those proposed by the secular government of New York is that the former need not contend with the formidable First Amendment obstacles that enslave the latter.[66]

Id. (citations omitted). When included in the text of a particular ketubah, the new clause binds the husband and wife to appear before a Bet Din for purposes of marital counseling and, if and when divorce is intended, for advice regarding the execution of that divorce. Feldman, *supra* note 4, at 141-42. "Though worded in general terms, the clause is intended to make the couple consult the bet din should they contemplate divorce." *Id.* at 142.

The insertion of this clause in a ketubah is of drastic significance in that it gives the bet din a Halakic right to compel the uncooperative husband to appear before it. This, in turn, proves to be of consequential import in that the Bet Din may then apply the fictions that compel his surrender of a get. *See infra* notes 62-63 and accompanying text.

"An observant Jew dared not ignore the summons to the Beth Din to arbitrate a get dispute [and] [t]he power of the community opinion normally compelled him to obey the decision of the rabbis. If he ignored an order to give his wife a get, he could be flogged until he changed his mind. (To paraphrase Maimonides, the great Jewish authority of the Middle Ages, he could be beaten until he said, 'I really want to [grant the get]).'" Hellman, *supra* note 3, at 42; *see also* Plaskow, *supra* note 11, at 86. Tactics used to compel the compliance with the wife's request for a get could range from community ostracism to corporal punishment. Feldman, *supra* note 4, at 143. For discussion of the Jewish ketubah, see *supra* notes 22-25 and accompanying text.

[62]Nadel, *supra* note 3, at 59-60. "If the husband's consent is compelled by the bet din, the divorce is valid despite his apparent lack of free will." Redman, *supra* note 23, at 394.

[63]Nadel, *supra* note 3, at 60.

[64]*See supra* notes 52-63 and accompanying text.

[65]*See supra* note 60 and accompanying text.

[66]For a discussion of these First Amendment constraints, see *infra* Part IV.

IV. NEW YORK'S CIVIL LAW RESPONSES THE GET DILEMMA[67]

Although religious efforts to alleviate the plight of the agunah are undeniably deserving of attention, what is of constitutional moment are the responses of civil government, specifically the legislative and judicial products of the State of New York.[68] As already intimated,[69] the struggles spawned by the Jewish get laws have not been confined exclusively to religious battlegrounds.[70] From early on, civil courts have been entreated to entertain civil litigation inspired wholly by the tenets of Jewish divorce law.[71] In fact, one of the arguably most effective means of minimizing the

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[67]For an analysis of the constitutionality of New York case law, see *infra* Part IV.

[68]In her survey of the agunah problem and its manifestation in the American legal system, Sreter comments that, "Most of the wrestling with [this] problem has taken place within New York State judicially, legislatively, and religiously." Sreter, *supra* note 27, at 706. This is attributed to the fact that the largest concentration of the traditional practicing Jewish community resides in New York. *Id.*

[69]*See supra* notes 8-9, 51 and accompanying text.

[70]"[Even p]rior to the adoption of the get statute, Jewish women looked to the courts for relief, basing their suits on theories such as contract, fraud, equity, and intentional infliction of emotional distress." Nadel, *supra* note 3, at 62. "[T]he American legal system has begun to recognize this situation, and state courts and legislatures have taken steps to remedy it." *Id.* (citations omitted).

[71]"In recent years, wives have begun to sue in civil courts to enforce agreements that require their husbands to cooperate in religious divorce." *Id.* at 63. "While it is Jewish law that creates the problem of the agunah, the intersection of the religious and the secular in our society amplifies it." Feldman, *supra* note 4, at 144. This statement is found in Feldman's discussion of the inadequacy of the religiously sponsored constructive consent solution to the agunah problem. Aside from criticisms as to the religious validity of that solution invoked by Orthodox rabbis, the theory's present inadequacy seems mostly to stem from the fact that the Jewish community currently lives under secular law and not Jewish law as in Talmudic times. *Id.* Thus, the authority of the Bet Din has been significantly depleted. *Id.* In light of this frequent inability to obtain religious relief, the dilemma has drawn the attention and efforts of secular courts and lawmakers. *Id*; *see also* Sreter, *supra* note 27, at 706-07.

In civil cases dealing with requests regarding or involving the get, courts have not been hesitant to credit religious doctrine as the source for the litigation before it. *See, e.g.*, Koeppel v. Koeppel, 138 N.Y.S.2d 366, 370 (N.Y. Sup. Ct. 1954) ("This action was then brought on August 11, 1954, to secure specific performance of defendant's agreement to comply with the necessary procedure to effectuate a religious dissolution in accordance with the laws of his faith . . . ."). In Avitzur v. Avitzur, 58 N.Y.2d 108 (N.Y. 1983),

distress and disputes identified with Jewish get law has been accomplished by the New York State Legislature and not by any religious association or affiliate.[72]

A review of New York's earliest management of the disputes engendered by the Jewish get laws discloses a prominent line of cases by courts that managed to accomplish a case by case disposal of this persisting problem by looking to contract and family law doctrines such as specific enforcement, duress, coercion and equitable distribution and which, more importantly, have successfully averted the First Amendment issues clearly implicated by the litigants' requests for relief.[73] The 1954 case of *Koeppel v. Koeppel*[74] presented one of the first in a series of cases to request secular enforcement of substantively religious contract provisions.[75] In that case, the Supreme Court of New York refused a husband's motion to dismiss his wife's claim for specific performance of his promise to deliver a get following her receipt of a secular annulment decree.[76] In *Koeppel*, the New

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the agreement at issue was a ketubah and the specific provision which the plaintiff sought performance required the defendant husband to at least appear before a religious tribunal. *Id.* at 112. Such terms are irrefutably religious in nature. For further discussions of *Koeppel* and *Avitzur*, see *infra* notes 74-83, 88-108 and accompanying text. For a further discussion of the "get statute," see *infra* notes 119-123 and accompanying text.

[72]*See infra* notes 170, 193 and accompanying text.

[73]*See infra* notes 74-118 and accompanying text (discussing New York case law, the First Amendment challenges presented therein, and New York court responses to such challenges).

[74]138 N.Y.S.2d 366 (N.Y. Sup. Ct. 1954), *aff'd*, 161 N.Y.S.2d 694 (N.Y. App. Div. 1957).

[75]*Koeppel* involved a wife's action against her secular ex-husband for specific performance of his pre-annulment promise to "obtain religious dissolution *in accordance with rules of their faith.*" *Id.* at 366 (emphasis added).

[76]*Id.* at 373. The specific provision of the contract upon which the wife's allegations of a promise were founded provided, in pertinent part, that:

> Upon successful prosecution of the Wife's action for the dissolution of her marriage, the Husband and Wife covenant and agree that he and she will, whenever called upon, and if and whenever the same shall become necessary, appear before a Rabbi or Rabbinate selected and designated by whomsoever of the parties who shall first demand the same, and execute any and all papers and documents required by and necessary to effectuate a dissolution of their marriage in accordance with the ecclesiastical laws of the Faith and Church of said parties.

York Supreme Court expressed a phrase that would reverberate in later New York opinions by courts allegedly applying "neutral principles"[77] of law to grant relief to plaintiffs afflicted with what is an essentially religious problem.[78] That phrase, which has thus far proved to be a successful means of avoiding a problem indisputably replete with First Amendment impediments, is simply that "[s]pecific performance . . . would merely require the defendant to do what he voluntarily agreed to do."[79]

At no point did the New York Supreme Court, if it even perceived such to be the case, acknowledge the possibility that its opinion had the effect of establishing or infringing upon religion.[80] In fact, the *Koeppel* court's response to the defendant's contention that the ordering of specific performance of this type of contract would violate constitutionally protected

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Id. at 369-70.

It is noteworthy that the aforementioned written agreement was entered into at a time when the parties were still married but living apart from one another and subsequent to the wife's commencement of an action to annul the marriage. *Id.* at 369. Pursuant to the agreement itself, the entire agreement was to derive its enforceability from the success of the wife's civil annulment action. *Id.* In the event that the action was dismissed or resolved in the defendant's favor the agreement provided that it would lack enforceability in its entirety. *Id.* The judgment of annulment, initially an interlocutory judgment, was finalized on July 14, 1954, approximately six months following the parties signing of the agreement in issue. *Id.* at 369-70. Consequently, the wife made repeated requests that the defendant appear before a Rabbi for purposes of executing religious dissolution of their marriage as agreed upon in the contract. *Id.* at 370. The defendant repeatedly refused to appear. *Id.*

[77]"Neutral principles" is a term of art pertaining to application of "objective, well-established concepts" to legal issues potentially implicating religious doctrine. *See, e.g.*, Jones v. Wolf, 443 U.S. 595, 603-04 (1979) (approving the application of the "neutral principles" doctrine to adjudications of church property disputes). For a more detailed discussion of the "neutral principles" doctrine, see *infra* notes 138-150 and accompanying text. It was actually the Georgia Supreme Court that was accredited with the "neutral principles" approach to religious related disputes in *Jones*. *See infra* note 142 and accompanying text. However, it is clear that New York courts, as early as *Koeppel*, were employing what would later be termed the "neutral principles" method of managing religiously affiliated disputes.

[78]The problem herein referred to is the withholding of a get.

[79]Koeppel v. Koeppel, 138 N.Y.S.2d 366, 373 (N.Y. Sup. Ct. 1954), *aff'd*, 161 N.Y.S.2d 694 (N.Y. App. Div. 1957).

[80]For a detailed discussion of this point, see *infra* Part IV.

rights consumed only four sentences of the seven-page opinion.[81] The court merely dismissed the allegation with a brief statement of its determination that "[c]omplying with his agreement would not compel the defendant to practice any religion."[82] Although Mrs. Koeppel's complaint was ultimately dismissed on appeal due to indefiniteness of the contract, the New York Supreme Court's premise that a contractual theory could support enforceability of such agreements was thereafter sustained.[83]

In 1973, a New York Family Court in Bronx County had occasion to apply the contract principles approach to a dispute similar to that in *Koeppel* but involving the withholding of a get by a recalcitrant wife as opposed to an uncooperative husband. *Rubin v. Rubin*[84] presented the issue of whether a wife's promise, included as a specific term in a separation agreement, to cooperate in the attainment of a religious divorce could be enforced by a civil court as a condition precedent to her husband's obligation to pay support and alimony.[85] The Family Court announced its decision to enforce the promise in terms of rudimentary contract principles citing *Koeppel* as authority for doing so.[86] Highlighting, as did the *Koeppel* court, that two consenting parties may impart civil law significance upon religiously affiliated acts or promises via a private contractual agreement, the Family Court did find Mr.

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[81]*See Koeppel*, 138 N.Y.S.2d at 373.

[82]*Id.*

[83]*Koeppel*, 161 N.Y.S.2d (N.Y. App. Div. 1957); *see also* Moskowitz, *supra* note 18, at 317 (discussing the outcome of *Koeppel* on appeal).

[84]75 Misc. 2d 776 (N.Y. Fam. Ct. 1973).

[85]*Id.* at 777-78. Apparently, the parties entered into an initial separation agreement on March 10, 1961, which did not contain an agreement with respect to cooperation in religious divorce proceedings. *Id.* at 778. This agreement was, however, rendered moot when the parties entered into a subsequent agreement on October 4, 1972, as part of a settlement evolving during proceedings to enforce the initial separation agreement. *Id.* The 1972 agreement contained a hand-written clause, initialled by both parties, binding them to cooperation in the securing of a Jewish divorce. *Id.* It is non-fulfillment of this promise which instigated the litigation in issue in the *Rubin* opinion.

Based upon Judge Gartenstein's presentation of the facts, Mrs. Rubin originally refused only to making an appearance before a rabbinical court for purposes of obtaining a get, an appearance that the Family Court concluded, based upon ecclesiastical law, was unnecessary anyway. *Id.* at 778. The real problem arose when Mrs. Rubin extended her refusal to manifest consent to the securing of a get. *Id.* at 779.

[86]*Id.* at 782. "The courts of this state have recognized the validity of an agreement to obtain a Get." *Id.* (quoting *Koeppel*, 138 N.Y.S.2d 366 (N.Y. Sup. Ct. 1954)).

Rubin's obligation to pay continued support to his former wife to be contingent upon her fulfillment of the promise to secure a get.[87]

In the landmark case of *Avitzur v. Avitzur*,[88] the New York courts were beckoned to order civil enforcement of the terms contained in a ketubah.[89] The facts presenting themselves to the court involved a Jewish couple's signing of two prenuptial agreements, one in Hebrew/Aramaic and another in English.[90] The clause which spawned the litigation encompassed the parties' agreement to recognize a Jewish tribunal, or Beth Din, as having the authority to counsel the parties with respect to marital dilemmas and, likewise, to impose any compensatory terms deemed appropriate in the event that either party failed to effectuate a decision rendered by the tribunal.[91]

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[87]*Rubin*, 75 Misc.2d at 782-83. Noting that "[t]he condition precedent could well have been anything else made crucial by agreement of the parties," the family court refused to nullify the agreement previously reached by the parties based merely on the fact that what would otherwise be classified a "condition precedent" under contract principles "happen[ed] [in this case] to be an act of religious significance." *Id.* at 782. Averting the religiously distinctive aspects of the contract in question, the court referred to the "basic rule of contracts that people are bound by the promises they undertake" and the contractual proposition that "parties to a separation agreement may make alimony [and] even child support payments contingent upon the express terms thereof." *Id.*

Thus, the *Rubin* court's analysis and ability to apply traditional contract tenets with such ease despite evident constitutional impediments appeared to be based upon a central assumption that specific court enforcement of religiously inspired activity becomes free of constitutional ramifications when a court is enforcing a promise voluntarily assumed by a contracting party. In support of this assumption, the court was clear to specify that religious divorce law was only relevant and significant to the extent the parties themselves had determined to make it so. *Id.* at 777.

[88]446 N.E.2d 136 (N.Y. 1983), *cert. denied*, 464 U.S. 817 (1983).

[89]*Id.* at 137. For a detailed discussion of the ketubah, see *supra* notes 22-25.

[90]*Avitzur*, 446 N.E.2d at 137.

[91]*Id.* Specifically, the clause provided:

> "[W]e, the bride and bridegroom . . . hereby agree to recognize the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America or its duly appointed representatives, as having authority to counsel us in light of Jewish tradition which requires husband and wife to give each other complete love and devotion, and to summon either party at the request of the other, in order to enable the party so requesting to live in accordance with the standards of the Jewish law of marriage throughout his or her lifetime. We authorize the Beth Din to impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decision."

Litigation ensued upon Mr. Avitzur's ultimately failure to honor the agreement by virtue of his refusal to obey a Beth Din's summons that he appear before it.[92]

The nature of Mrs. Avitzur's complaint was a breach of contract claim.[93] Her allegations asserted that the defendant had breached what constituted a binding marriage contract, the terms of which mandated his appearance before a Beth Din.[94] As the Court of Appeals aptly noted, the plaintiff's desire to enforce her husband's promise to appear before the Beth Din emanated from the Jewish law requirement that a couple appear before a Beth Din to obtain a get.[95] Thus, her husband's refusal to appear before the religious tribunal operated to prevent her procurement of a religious divorce.[96] The defendant's response to his wife's complaint was a motion to dismiss the action due to the court's lack of subject matter jurisdiction and the complaint's failure to state a cause of action.[97] Significant is that his motion was premised upon the argument that resolution of the dispute would entail the court's impermissible involvement in a "purely religious matter."[98]

Id. (quoting the terms of the Jewish marital contract signed by the parties). The agreement was undertaken in response to the parties' asserted "desire to live in accordance with the Jewish law of marriage throughout [their] lifetime." *Id.* For a more detailed discussion of the Bet Din, see *supra* note 59 and accompanying text.

[92]*Id.*

[93]*Id.*

[94]*Id.* It is significant to recognize, for purposes of a constitutional analysis of whether the First Amendment to the Constitution effectively precludes enforcement of such agreement, that, as distinguishable from *Koeppel*, Mrs. Avitzur did not seek specific enforcement of a promise to deliver a get. Rather, in addition to seeking a declaratory judgment that the agreement in question was a marriage contract, she sought specific enforcement of her husband's promise to appear before a Beth Din, which might ultimately advise the husband of a duty, "in accordance with . . . Jewish law" to deliver his wife a get. *Id.* at 137-38.

[95]*Id*; *see also supra* note 61 and accompanying text.

[96]Avitzur v. Avitzur, 446 N.E.2d 136, 137 (N.Y. 1983). For a detailed discussion of the implications of not obtaining a religious, as opposed to civil, divorce, see *supra* notes 34-43 and accompanying text.

[97]*Avitzur*, 446 N.E.2d at 137.

[98]*Id.*

The special term's response to the defendant's religion clause challenge was similar to the supreme court's in *Koeppel*.[99] The court noted that according to the special term, since the plaintiff sought only to compel her husband to perform an act which the defendant had voluntarily assumed to do pursuant to a contract, an order requiring his performance would engage no impermissible entanglement with religion.[100] Dissimilarly, the appellate division, having classified the agreement as "religious covenant" or "liturgical agreement" because of the fact that its execution was part of a religious ceremony, had concluded that such agreements are unenforceable by the State and granted the defendant's motion to dismiss.[101]

Upon its review of the question, the New York Court of Appeals held that secular terms contained in an agreement that was itself executed as part of a religious ceremony were, in fact, enforceable in the state civil courts of New York[102] thereby reversing the appellate division's holding that enforcement of such "religious covenants" was beyond the jurisdiction of the civil courts.[103] Analogizing the Avitzurs' agreement to refer divorce matters to a nonjudicial forum to an antenuptial agreement whereby parties agree to arbitrate certain disputes according to the law and/or tradition selected by the parties, the court concluded that the provision in question was enforceable under the "neutral principles of law approach" to determining religiously related issues.[104]

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[99]*Id.* (citing Koeppel v. Koeppel, 138 N.Y.S.2d 366 (N.Y. Sup. Ct.), *aff'd*, 161 N.Y.S.2d 694 (N.Y. App. Div. 1957)); *see also infra* notes 74-83 and accompanying text.

[100]*Avitzur*, 446 N.E.2d at 137.

[101]*Id.* at 137-38. The explicitly stated rationale underlying the appellate division's finding of unenforceability arose out of the court's conclusion that following the granting of a civil divorce, the State lacks any further interest in the parties' marital status. *Id.* at 138.

[102]*Id.* at 138.

[103]*Id.* at 572-73 (citation omitted).

[104]*Id.* at 138 (noting the well-established rule of enforceability of a duly executed antenuptial agreement containing an agreement to "arbitrate in accordance with the law and tradition chosen by the parties"). Thus, the *Avitzur* court extended the "neutral principles" approach to encompass application of "neutral" contract principles, as distinguishable from the "neutral" property law principles applied in *Jones v. Wolf*, so as to facilitate a decision enforcing Mr. Avitzur's promise to appear before a religious tribunal. *Id.* at 578-79; *see also supra* notes 138-150 and accompanying text (setting forth the "neutral principles" of contract law approach to resolving religious disputes).

The court utilized a two-step process to analyze the issue before it. First, it maintained that the fact of an agreement's religious nature or a finding that religion inspired its execution, does not foreclose secular court recognition of the obligations contained therein.[105] Second, it concluded that the particular dispute before it could be decided entirely upon application of "neutral principles" of contract law without any reference to religious doctrine whatsoever.[106] Thus, in line with the United States Supreme Court's opinion in *Jones v. Wolf*,[107] rendered four years earlier, the *Avitzur* court concluded that judicial resolution, to the extent accomplished in purely secular terms and without consideration of religious doctrine, was constitutionally permissible under the First Amendment.[108]

Aside from requests for New York courts to enforce contractual

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[105]Avitzur v. Avitzur, 446 N.E.2d 136, 138 (N.Y. 1983). In so deciding, the court of appeals discredited the defendant's contention that enforcement of a ketubah "necessarily intrudes upon matters of religious doctrine and practice." *Id.* "[D]efendant's objections to enforcement of his promise to appear before the Beth Din, based as they are upon the religious origin of the agreement, pose no constitutional barrier to the relief sought by plaintiff. The fact that the agreement was entered into as part of a religious ceremony does not render it unenforceable." *Id.* at 139.

[106]*Id.* at 138-39. "[T]he relief sought be plaintiff in this action is simply to compel defendant to perform a secular obligation to which he contractually bound himself. In this regard, no doctrinal issue need be passed upon, no implementation of a religious duty is contemplated, and no interference with religious authority will result." *Id.* at 139.

[107]443 U.S. 595 (1979).

[108]*Avitzur*, 446 N.E.2d at 138-39. It is surely a defendable contention that, with respect to First Amendment constraints, *Avitzur* pushed the New York courts deeper into dangerous waters than did *Koeppel*. While *Koeppel* involved a plaintiff's complaint for enforcement of her husband's voluntarily assumed obligation, post separation, to obtain a get, *Avitzur* presented a complaint seeking enforcement of a religious marriage document traditionally executed before an Orthodox marriage ceremony. Thus, at least on its face, the *Koeppel* case involved an issue of ordinary contract enforcement while *Avitzur* importuned a civil court to enforce a more distinctly religious agreement. It was perhaps for this reason that the New York Court of Appeals in *Avitzur*, was more willing to entertain and address the First Amendment challenges than was the United States Supreme Court in *Koeppel*. Whether or not the issues presented in *Koeppel* and its progeny are, in fact, adequately similar to the issue in *Jones* as to warrant application of *Jones'* principles will be taken up in greater detail in Part IV.

Two years later, the holding in *Avitzur* was followed in Aziz v. Aziz, 488 N.Y.S.2d 123 (N.Y. Sup. Ct. 1985), where the Supreme Court, Special Term, in Queens County, held that the secular terms of a religious document called a mahr, entered into as part of an Islamic religious ceremony, could be enforced by a secular court in a divorce proceeding. *Id.* at 123-24.

provisions requiring one party to deliver a get or to compel compliance with agreements entered into as a part of a religious ceremony, cases have arisen wherein the New York courts were called to review the propriety of enforcing agreements coerced by abuses of religiously derived power. Such was the case in *Perl v. Perl*[109] where the appellate division was confronted by a wife's contention that her former husband had utilized the religious power conferred upon him by Jewish religion to coerce her into an oppressive and inequitable property settlement.[110] After acknowledging the widespread recognition of the disparity in power between the sexes with respect to Jewish divorce law,[111] the appellate division reversed the lower court's granting of a summary judgment motion in favor of the husband on the issue of enforcement of the property distribution.[112] The court, in

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[109]512 N.Y.S.2d 372 (N.Y. App. Div. 1987).

[110]*Id.* After being married for 12 years, the parties in *Perl* were issued mutual judgments of divorce in June of 1982. *Id.* at 373. The equitable distribution of their property was postponed for future disposition. *Id.* In July of 1982 the parties supposedly came to a final stipulation settlement in open court wherein the wife promised to deliver certain securities, a deed conveying her one-half interest in the marital home, title to her automobile, a sum of $65,000 for various alleged debts and her personal jewelry. *Id.* at 373-74. For a detailed delineation of the specific terms contained in the agreement, see *supra* note 48.

Apparently, the only consideration received by the wife pursuant to this agreement was her husband's quitclaim of any interest in two jewelry corporations, concessions which the wife later claimed to be illusory due to her allegations that the corporations were entirely created and owned by her as separate property after the parties had already separated. *Perl*, 512 N.Y.S.2d at 374.

[111]"The unequal allocation of power between spouses to terminate a religious marriage — particularly where the partners are of the Jewish faith — has received the attention of the courts . . . the Legislature (Domestic Relations Law § 253), and the Executive, from which it is possible to discern an articulated public policy." *Id.* at 375. The court noted the Legislature's attempt to address the problem in its 1983 "get" statute also noting how the statute's removal of barriers requirement was inapplicable in the *Perl* case since the divorce decrees had been entered before its enactment. *Id.*

[112]*Id.* The lower court had concluded that the wife's allegations of respect to duress and coercion based upon her husband's "veto power" over their religious divorce were precluded as a matter of law by the parties' stipulation. *Id.* The stipulation, which was read into the record, provided that:

> [E]ach of the parties has had the opportunity to reflect upon the terms of the settlement dictated upon this record, having discussed it with their respective counsel, their accountants, family and friends and do enter into this stipulation of settlement voluntarily without any duress, fraud or coercion.

resorting to contract methods, made clear its conclusion that the gender disparity characteristic of Jewish divorce law could, similarly to any other factor, provide the basis for a refusal to recognize a particularly "inequitable" distribution if found to be the result of coercion or duress.[113]

Facts similar to those in *Perl* again presented themselves for review before the appellate division in *Golding v. Golding*[114] in February of 1992. That case involved a divorce action premised upon a wife's assertion of cruel and inhuman treatment complicated by her husband's interposing of an affirmative defense to the effect that the parties' marital disputes had been previously resolved in a separation agreement.[115] As in *Perl*, the wife's argument against enforcement of the separation agreement was that the

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Id. Despite the stipulation that the agreement was voluntary, educated and uncoerced, the appellate division, relying upon the common legal principle that "a divorce settlement tainted by duress is void *ab initio* [and therefore] not subject to ratification by the mere passage of time," concluded that there should nonetheless be a trial on the merits of the wife's claims of coercion. *Id.* at 376 (citations omitted). The appellate division's decision was based, in no small part, upon the fact that the wife's allegations that because of her religious need for a Jewish divorce she was victimized by economic duress "inflicting 'enormous anguish'" sounded exactly like the dilemma which the New York legislature intended to cure by its 1983 "get" legislation. *Id.* at 375. Thus, in light of recognition of the problem caused by the religious disparity and the New York legislature's intention to solve it, the court ordered further assessment of Mrs. Perl's coercion claims and rebuked the lower court's grant of conclusive effect to the negation of duress contained in the stipulation. *Id.* For a detailed discussion of N.Y. DOM. REL. LAW § 253, otherwise referred to as the "get legislation," see *infra* notes 119-123 and accompanying text.

[113]*Perl*, 512 N.Y.S.2d at 375. After reciting the general principle that, "*absent a showing of fraud, mistake, duress or overreaching*, an oral stipulation of settlement of property issues in a matrimonial action, if spread upon the record *and found to be fair and reasonable*, will not be disturbed by the court," the appellate division remonstrated that "where the parties can be restored to their former position and the *stipulation is inequitable*, it will be dissolved." *Id.* (citations omitted) (emphasis added). The court also emphasized that stipulations are not to be given effect where doing so would work an injustice and noted that strict surveillance of transactions between married persons is ordinary. *Id.* "These principles in mind, courts have thrown their cloak of protection about separation agreements and made it their business, when confronted, to see to it that they are arrived at fairly and equitably, in a manner so as to be free from the taint of fraud and duress, and to set aside or refuse to enforce those born of and subsisting in inequity." *Id.* at 376.

[114]581 N.Y.S.2d 4 (N.Y. App. Div. 1992).

[115]*Id.* at 5.

religious duress applied to secure it rendered it void.[116] Citing *Avitzur*, *Perl* and the United States Supreme Court opinion in *Jones* as support, the appellate division decided that the case could be "decided solely upon the neutral principles of contract law, without reference to any religious principle."[117] Thus, while commenting upon the First Amendment limitations on a court's ability to delve into matters of religious doctrine, the appellate division in *Golding* reaffirmed its holding in *Perl* that the substance of a divorce or property agreement could be examined to ensure against fraud, duress or overreaching stemming from a husband's religious veto power over the attainment of a get.[118]

In 1983 the New York legislature tread deeper into the precarious waters of the First Amendment when it amended its Domestic Relations Law to add section 253 which requires a complaint for secular divorce or

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[116]The wife's testimony at the hearing on the motions raised by the parties disclosed her fear of not receiving a get. *Id.* Mrs. Golding testified that her husband threatened her that "he would not accord her a Get, . . . unless she gave him everything that he wanted." *Id.* The trial court in *Golding* had specifically noted the Jewish wife's nearly total dependence upon her husband in receiving a religious divorce as well as the significance placed upon such a divorce for purposes of religious remarriage. *Id.* The appellate division in *Perl* also recognized the relevance of the husband's participation in the Jewish divorce process when it characterized the husband as holding a "veto power." *Perl*, 512 N.Y.S.2d at 373. "[W]e hold that where either spouse has invoked the power of the state to effect a civil dissolution of a marriage, an oppressive misuse of the religious *veto power* by one of [the spouses] subjects the economic bargain which follows . . . to review and potential revision." *Id.* Mrs. Perl's pleadings had declared that the distribution of the couple's marital assets before the referee "constituted nothing less that a total surrender of her rights brought about by the husband's duress and destruction of her independent will power." *Id.* at 374.

[117]*Golding*, 581 N.Y.S.2d at 7 (citing Avitzur v. Avitzur, 446 N.E.2d 136, 138 (N.Y. 1983)).

[118]*Id.* This was so despite the fact that the agreement at issue in *Golding* was the product of rabbinical, rather than secular, arbitration. *Id.* at 7. The appellate division in *Golding* recognized that its decisions in both *Perl*, as well as the case currently before it, involved a problem precipitated by religious doctrine. *Id.* at 6. "In *Perl v. Perl*, . . . this court *addressing the situation created by the husband's virtual control over the procurement of a Get* . . . ." *Id.* (emphasis added). For a discussion of New Jersey's nearly identical approach to claims of duress or coercion based upon the male's veto power over the get, see Segal v. Segal, 278 N.J. Super. 218, 222-24 (N.J. Super. App. Div. 1994) (making the get scenario no exception to the general rule that "any spousal agreement 'may be set aside 'when it is the product of fraud or overreaching by a party with power to take advantage of a confidential relationship'"') (quoting Guglielmo v. Guglielmo, 253 N.J. Super. 531, 541 (N.J. Super. App. Div. 1992) (quoting Dworkin v. Dworkin, 217 N.J. Super. 518, 523 (N.J. Super. App. Div. 1987)))).

annulment to contain affirmative allegations that inevitably implicate religious doctrine.[119] Specifically, the plaintiff, and sometimes a defendant, must

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[119]N.Y. DOM. REL. LAW § 253 (McKinney 1986). The statute provides in pertinent part:

> 1. This section applies only to a marriage solemnized in this state or in any other jurisdiction by a person specified in subdivision one of section eleven of this chapter.
> 2. Any party to a marriage defined in subdivision one of this section who commences a proceeding to annul the marriage or for a divorce must allege, in his or her verified complaint: (i) that, to the best of his or her knowledge, that he or she has taken or that he or she will take, prior to the entry of final judgment, all steps solely within his or her power to remove any barrier to the defendant's remarriage following the annulment or divorce; or (ii) that the defendant has waived in writing the requirements of this subdivision.
> 3. 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.
> 4. In any action for divorce based on subdivisions five and six of section one hundred seventy of this chapter in which the defendant enters a general appearance and does not contest the requested relief, no final judgment of annulment or divorce shall be entered unless both parties shall have filed and served sworn statements: (i) that he or she has, to the best of his or her knowledge, taken all steps solely within his or her power to remove all barriers to the other party's remarriage following the annulment or divorce; or (ii) that the other party has waived in writing the requirements of this subdivision.
> 5. The writing attesting to any waiver of the requirements of subdivision two, three or four of this section shall be filed with the court prior to the entry of a final judgment of annulment or divorce.
> 6. As used in the sworn statements prescribed by this section "barrier to remarriage" includes, without limitation, any religious or conscientious restraint or inhibition, of which the party required to make the verified statement is aware, that is imposed on a party to a marriage, under the principles held by the clergyman or minister who has solemnized the marriage, by reason of the other party's commission or withholding of any voluntary act. Nothing in this section shall be construed to require any party to consult with any clergyman or minister to determine whether there exists any such religious or conscientious restraint or inhibition. It shall not be deemed a "barrier to remarriage" within the meaning of this section if the restraint or inhibition cannot be removed by the party's voluntary act. Nor shall it be deemed a "barrier to remarriage" if the party must incur expenses in connection with removal of the restraint or inhibition and the other party

include a verified statement that, "to the best of his or her knowledge, that he or she has taken or will take, prior to the entry of final judgment, all steps solely within his or her power to remove any barrier to the defendant's remarriage following the annulment or divorce."[120]

In light of section 253's requirement that no final judgment of divorce be entered absent court receipt of the required "removal of barriers" statement, the statute has the ultimate effect of preventing an Orthodox woman's husband, when in the position of plaintiff, from obtaining a civil divorce decree unless he gives his wife a religious divorce.[121] Consequently, it has been outwardly acknowledged that the New York legislature's design in enacting section 253 was to reduce, if not eliminate, litigation over the withholding of Jewish divorces.[122] Irrespective of the specific intent attributed to it, recognition of the statute's effect has earned section 253 its unofficial title, the "get statute," a name by which it is widely referred.[123] The fact that a statute, neutral toward religion on its face, is

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> refuses to provide reasonable reimbursement for such expenses. "All steps solely within his or her power" shall not be construed to include application to a marriage tribunal or other similar organization or agency of a religious denomination which has authority to annul or dissolve a marriage under the rules of such denomination.

Id. For a discussion of the constitutionality of § 253, see *infra* Part IV.

[120]N.Y. DOM. REL. LAW § 253 (2)-(4); *see also supra* note 119 and accompanying text.

[121]*See* Feldman, *supra* note 4, at 152-53.

[122]"Although the statute is phrased in ostensibly neutral language, its avowed purpose is to curb what has been described as the withholding of Jewish religious divorces, despite the entry of civil divorce judgments, by spouses acting out of vindictiveness or applying economic coercion . . . . Though this is the purpose of the statue, [it] makes no express references to Jewish religious divorces or Jewish religious tribunals." ALAN SCHEIKMAN, PRACTICE COMMENTARIES AFTER EDL § 253 (1986) (citing the Governor's Memorandum of Approval, McKinney's 1983 Session Laws of New York, at 2818-19).

[123]In 1992, the fear of any significant First Amendment challenge still unrealized, the New York legislature amended its equitable distribution laws to allow a judge to consider the effect which any particular "barrier to remarriage" might have for purposes of determining what would constitute an "equitable" distribution and for evaluating the factors used to determine amounts and duration of maintenance imposed in a divorce action. N.Y. DOM. REL. LAW § 236B (McKinney Supp. 1993). The statute provides in pertinent part:

> 5. Disposition of property in certain matrimonial actions.
> a. Except where the parties have provided in an agreement for the

disposition of their property pursuant to subdivision three of this part, the court, in an action wherein all or part of the relief granted is divorce, or the dissolution, annulment or declaration of the nullity of a marriage, and in proceedings to obtain a distribution of marital property following a foreign judgment of divorce, shall determine the respective rights of the parties in their separate or marital property, and shall provide for the disposition thereof in the final judgment . . . .

. . . .

c. Marital property shall be distributed equitably between the parties, considering the circumstances of the case and of the respective parties.

d. In determining an equitable disposition of property under paragraph c, the court shall consider:

(1) the income and property of each party at the time of marriage, and at the time of the commencement of the action;

(2) the duration of the marriage and the age and health of both parties;

(3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects;

(4) the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;

(5) any award of maintenance under subdivision six of this part;

(6) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;

(7) the liquid or non-liquid character of all marital property;

(8) the probable future financial circumstances of each party;

(9) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party;

(10) the tax consequences to each party;

(11) the wasteful dissipation of assets by either spouse;

(12) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;

(13) any other factor which the court shall expressly find to be just and proper . . . .

. . . .

h. In any decision made pursuant to this subdivision the court shall, where appropriate, consider the effect of a barrier to remarriage, as defined in subdivision six of section two hundred fifty-three of this article, on the factors enumerated in paragraph d of this subdivision.

6. Maintenance.

a. Except where the parties have entered into an agreement pursuant to subdivision three of this part providing for maintenance, in any matrimonial

widely referred to by a term whose only significance is of a religious nature is indicative of the First Amendment issues underlying the statute.

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action the court may order temporary maintenance or maintenance in such amount as justice requires, having regard for the standard of living of the parties established during the marriage, whether the party in whose favor maintenance is granted lacks sufficient property and income to provide for his or her reasonable needs and whether the other party has sufficient property or income to provide for the reasonable needs of the other and the circumstances of the case and of the respective parties. Such order shall be effective as of the date of the application therefor, and any retroactive amount of maintenance which has been paid. In determining the amount and duration of maintenance the court shall consider:

(1) the income and property of the respective parties including marital property distributed pursuant to subdivision five of this part;

(2) the duration of the marriage and the age and health of both parties;

(3) the present and future earning capacity of both parties;

(4) the ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefor;

(5) reduced or lost lifetime earning capacity of the party seeking maintenance as a result of having foregone or delayed education, training, employment, or career opportunities during the marriage;

(6) the presence of children of the marriage in the respective homes of the parties;

(7) the tax consequences to each party;

(8) contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;

(9) the wasteful dissipation of marital property by either spouse;

(10) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration; and

(11) any other factor which the court shall expressly find to be just and proper . . . .

. . . .

. . . .

d. In any decision made pursuant to this subdivision the court shall, where appropriate, consider the effect of a barrier to remarriage, as defined in subdivision six of section two hundred fifty-three of this article, on the factors enumerated in paragraph a of this subdivision.

Id.

V. NEW YORK LAW UNDER UNITED STATES CONSTITUTIONAL SCRUTINY

A. THE FIRST AMENDMENT GENERALLY

It is a virtually uncontested point that freedom of religion and the corresponding notion of separation of church and state are precepts firmly embedded in American history as well as constitutional doctrine.[124] This

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[124]There is a penchant for Supreme Court Justices to refer to the significance placed upon the freedom of religion in this society. Justice Brennan's concurring and dissenting opinion in Braunfeld v. Brown, 366 U.S. 599 (1960) exemplifies this universal recognition of the nation's commitment to religious liberty:

> [R]eligious freedom — the freedom to believe and to practice strange and, it may, foreign creeds — has classically been one of the highest values of our society . . . . The honored place of religious freedom in our constitutional hierarchy, suggested long ago by the argument of counsel in *Permoli v. Municipality* [citations omitted], and foreshadowed by a prescient footnote in *United States v. Carolene Products Co. . . . must now be taken to be settled.*

Id. at 610-13 (Brennan, J., concurring in part and dissenting in part) (emphasis added). The Court made similar comments concerning the ardor with which religion has been defended in this nation in Wisconsin v. Yoder, 406 U.S. 205, 214 (1971), where the Court stated that, "[t]he values underlying these two provisions [the Free Exercise and Establishment Clauses] relating to religion *have been zealously protected*, sometimes even at the expense of other interests of admittedly high social importance." *Id.* (emphasis added).

State courts are no less inclined to employ lofty echoes of religious freedom in supporting their own holdings. For example, in its opinion affirming a lower court's decision that an implied trust theory could be the decisive factor in determining which of two churches contesting the other's ownership and possession of certain properties should prevail, the Georgia Supreme Court stated that, "[t]he *traditional American doctrine of freedom of religion and separation of church and state* carries with it freedom of the church from having its doctrines or beliefs defined, interpreted, or censored by civil courts." Presbyterian Church In the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 442, 444 n.3 (1968) (emphasis added) (citing Presbyterian Church In the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 159 S.E.2d 690, 695-96 (Ga. 1968)).

Thomas Jefferson's eminent "wall of separation" notion has served as a "useful figurative illustration to emphasize" the isolation of government from religion that the Framers considered vital to a democratic society. Larkin v. Grendel's Den, Inc., 459 U.S. 116, 122-23 (1982). The "wall of separation" concept represents how, with the twin designs of "foreclos[ing] state interference with the practice of religious faiths, and . . . foreclosing the establishment of a state religion familiar in other 18-century systems," the Framers set out to insulate religion and government from one another specifically so

that they could coexist. *Id.* at 122 (citations omitted); *see also* Lynch v. Donnelly, 465 U.S. 668, 673 (1984). The Supreme Court's observance of this particular intent of the Framers is evidenced by statements such as this: "Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction *and churches excluded from the affairs of government.*" Lemon v. Kurtzman, 403 U.S. 602, 625 (1971) (emphasis in original). For a further discussion on the "wall of separation" concept articulated by Thomas Jefferson, see generally, Reynolds v. United States, 98 U.S. 145, 164 (1878); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1159 (2d ed. 1988).

There is no doubt that the Framers' firm determination to safeguard religious beliefs and practice derived from an inauspicious familiarity with the tendency of religion to divide otherwise strong societies. In the introduction to his discussion of religious freedom under the United States Constitution, John E. Semonche addressed this fear of the Framers: "Well aware that religious differences could fester and disrupt society, they [the Framers] made a virtue of the existing religious diversity. Protecting religious liberty would bolster the new experiment in government; that government was told clearly not to intrude into the religious realm." JOHN E. SEMONCHE, RELIGION & CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES, 1 (1986).

The Supreme Court proffered the same rationales in support of religious freedom in *School Dist. of the City of Grand Rapids v. Ball*:

> [J]ust as religion throughout history has provided spiritual comfort, guidance, and inspiration to many, it can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religions or sects that have from time to time achieved dominance. The solution to this problem adopted by the Framers and consistently recognized by this Court is jealously to guard the right of every individual to worship according to the dictates of conscience while requiring the government to maintain a course of neutrality among religions, and between religion and non-religion.

Ball, 473 U.S. 373, 382 (1984). The same viewpoints were noted by Justice Murhphy in his dissenting opinion in *Prince v. Massachusetts*:

> No chapter in human history has been so largely written in terms of persecution and intolerance as the one dealing with religious freedom. From ancient times to the present day, the ingenuity of man has known no limits in its ability to forge weapons of oppression for use against those who dare to express or practice unorthodox religious beliefs.

Prince, 321 U.S. 158, 175-76 (1944) (Murhphy, J., dissenting) (characterizing religious freedom as a "sacred right"). In the same vein, the Court, in *Lemon*, stated that "[t]he highways of church and state relationships are not likely to be one-way streets, and the Constitution's authors sought to protect religious worship from the pervasive power of government," again citing the hazards implicit in religion's intrusion into political or governmental matters as the reason behind a constitutionally required separation of church and state. *Lemon*, 403 U.S. at 623; *see also* Lawrence C. Marshall, Comment, *The Religion Clauses and Compelled Religious Divorces: A Study in Marital and Constitutional*

point is explicitly demonstrated by the fact that the First Amendment[125] to

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Separations, 80 NW. U. L. REV. 204, 245-46 (1985).

And so, in light of the Framers' convictions that government involvement in matters of religion was "fraught with great dangers," the Constitution's authors determined to "prohibit the establishment of a state church or a state religion . . . [and also] commanded that there should be 'no law [so much as] respecting an establishment of religion.'" *Lemon*, 403 U.S. at 612.

In various discussions concerning the appropriate meaning of the word "religion" as well as discussions regarding the scope of the First Amendment in general, the Supreme Court has repeatedly referred to the development of religious freedom as it was initiated in Virginia prior to the Constitution's adoption. For instance, in Reynolds v. United States, 98 U.S. 145 (1878), the Court, after again explaining the religious dissension that threatened national unity, reviewed the growth of recognition of a need for religious freedom which transpired in Virginia in 1784 when controversy over a bill, then under consideration in the Virginia House of Delegates, establishing "provision for teachers of the Christian religion," was opposed by various politicos, among them Mr. James Madison. *Id.* at 162-63. The Court stated:

> Before the adoption of the Constitution, attempts were made in some of the colonies and States to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed, against their will, for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. Punishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining heretical opinions. The controversy upon this general subject was animated in many of the States, but seemed at last to culminate in Virginia . . . . [In response to the proposed bill establishing provision for Christian teachers] Mr. [James] Madison prepared a 'Memorial and Remonstrance', which was widely circulated and signed, and in which he demonstrated 'that religion, or the duty we owe the Creator,' was not within the cognizance of civil government . . . [a]t the next session the proposed bill was not only defeated, but another, 'for establishing religious freedom', drafted by Mr. [Thomas] Jefferson, was passed.

Id.; *see also Braunfeld*, 366 U.S. at 602 ("In McGowan v. Maryland, . . . we noted the significance that this Court has attributed to the development of religious freedom in Virginia in determining the scope of the First Amendment's protection.").

[125]The First Amendment provides, in pertinent part, that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

the Federal Constitution contains two clauses[126] specifically dedicated to the protection of religious freedom and is further confirmed by the Supreme Court's very early decision to make those clauses wholly binding upon the individual states through the Fourteenth Amendment.[127]

Although the importance of religious liberty in the United States is prevalently conceded, there is a marked absence of consensus as to how

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[126]Religious liberty is imparted to United States citizens by virtue of two separate clauses of the First Amendment. In *Yoder*, where the Court expounded that, "[l]ong before there was general acknowledgement of the need for universal formal education, the Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government," thereby highlighting the fact that the First Amendment contains two distinct dictates with respect to religion. *Yoder*, 406 U.S. at 214; *see also* TRIBE, *supra* note 124, at 1154 ("The constitutional concepts of religious autonomy were first articulated in the religion clauses of the first amendment, assuring both free exercise and nonestablishment.").

The case law is imbued with declarations as to the independent contribution of each clause to the guarantee of religious liberty. In *Gillette v. United States* the Court, faced with allegations that an exemption from participation in war, applicable only to persons conscientiously opposed to all wars, violated both clauses of the First Amendment, stated that, "despite a general harmony of purpose between the *two* religious clauses of the First Amendment, the Free Exercise Clause no doubt has a reach of its own." *Gillette*, 401 U.S. 437, 461 (1971) (emphasis added) (citations omitted); *see also* Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2487 (1994) ("A proper respect for *both* the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion.") (emphasis added); TRIBE, *supra* note 124, at 1156-57:

> To the Framers, the religion clauses were at least compatible and at best mutually supportive. A harmonious relationship occasionally obtains even today. . . . Despite this harmony, serious tension has often surfaced between the two clauses . . . .
>
> . . . A pervasive difficulty in the constitutional jurisprudence of the religion clauses has accordingly been the struggle "to find a neutral course between the two Religion Clauses, both of which are case in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."

Id. (quoting Walz v. Tax Comm'n., 397 U.S. 664, 668-69 (1970)).

[127]*See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (making the Free Exercise Clause of the First Amendment to the United States Constitution wholly applicable to the states by the Fourteenth Amendment); Everson v. Board of Educ., 330 U.S. 1, 8 (1947) (application of the Establishment Clause to the states). Thus, freedom of religion has been recognized to be "of the very essence of a scheme of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325 (1937).

conflicts between religious practice and secular state interests, when they arise, can be resolved in a manner consistent with the religious sanctity intended by the First Amendment.[128] Despite this proclivity of Supreme

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[128]*See, e.g.*, *Grumet*, 114 S. Ct. at 2495 (O'Connor, J., concurring) (pondering the question of what, exactly, the government can do, consistently with the Establishment Clause, to accommodate religious beliefs); TRIBE, *supra* note 124, at 1158-61 (noting the existence of "at least three distinct schools of thought which influenced the drafters of the Bill of Rights" as well as the Supreme Court's often insuperable challenge of interpreting rights to religious autonomy in light of the inability to ascertain the intended scope of the religion clauses). "Because those who drafted and adopted the First Amendment could not have foreseen either the growth of social welfare legislation or the incorporation of the First Amendment into the Fourteenth . . . , we simply do not know how they would view the scope of the two clauses." *Id.* at 1163-64 (quoting Thomas v. Review Bd., 450 U.S. 707, 722 (1981) (Rehnquist, J., dissenting).

Thus, even Supreme Court Justices, highly familiarized with the Constitution and charged with the duty of dispensing its commandments, disagree as to the proper interpretation of the words with which that document bestows religious freedom. The divergence in the opinions of the Justices is exemplified by Justice Scalia's concurring opinion in Lamb's Chapel v. Center Moriches Sch. Dist., 113 S. Ct. 2141, 2151 (1993) (Scalia, J., concurring), wherein the Justice, in explaining his failure to join in the Court's rationale as to why a New York school board's grant, to an evangelical community church, of access to school premises for the purpose of showing films related to Christian values, would not effectuate an establishment of religion. *Id.* at 2149-50 (Scalia, J., concurring). Though agreeing that the board's failure to permit use of classrooms for such a purpose would violate the Church's First Amendment rights to free-speech, Justice Scalia disparaged the Court's resort to the three-prong establishment clause test set forth in *Lemon* on the basis of his opinion that since the *Lemon* test had been "repeatedly killed and buried," it should no longer be resorted to. *Id.* at 2149 (Scalia, J., concurring). In addition to his disapproval of the Court's employment of the *Lemon* test, Justice Scalia expressed a strong disagreement with the Court's interpretation of what exactly the Establishment Clause requires. The Justice stated:

> I cannot join for yet another reason: the Court's statement that the proposed use of the school's facilities is constitutional because (among other things) it would not signal endorsement of religion in general. . . . What a strange notion, that a Constitution which *itself* gives 'religion in general' preferential treatment (I refer to the Free Exercise Clause) forbids endorsement of religion in general.

Id. at 2151 (Scalia, J., concurring) (citation omitted) (emphasis in original). The Justice then went on to recite portions of the Northwest Territory Ordinance of 1789 in an effort to refute the New York Attorney General's argument that, "'[r]eligious advocacy . . . serves the community only in the eyes of its adherents and yields a benefit only to those who already believe.'" *Id.* (citations omitted). Specifically, Justice Scalia cited article III of the Ordinance which provided that, "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *Id.*

Court Justices to differ in their opinions as to the exact breadth and application of the protections contained in the Religion Clauses, there are discernible indications in the case law as to how constitutional challenges to New York's methods of resolve in the get area should be determined.

An appropriate understanding of any analysis as to the constitutionality of New York's handling of the get dilemma entails recognition that New York law has generated separate and distinct methods of either resolving or minimizing the number of disputes engendered by the Jewish get laws[129] and that, although evidencing similarities, each of these methods is deserving of its own, independent constitutional evaluation.[130] While contractually

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Justice Stewart's disagreement with colleagues over the proper interpretation and application of the Establishment Clause was also apparent in his concurring opinion in Sherbert v. Verner, 374 U.S. 398, 413-18 (1962) wherein the Justice stated:

> I am convinced that no liberty is more essential to the continued vitality of the free society which our Constitution guarantees than is the religious liberty protected by the Free Exercise Clause explicit in the First Amendment and imbedded in the Fourteenth. And I regret on occasion, . . . the Court has shown what has seemed to me a distressing insensitivity to the appropriate demands of this constitutional guarantee. By contrast I think that the Court's approach to the Establishment Clause has on occasion, . . . been not only insensitive, but positively wooden, and that the Court has accorded to the Establishment Clause a meaning to which neither the words, the history, nor the intention of the authors of that specific constitutional provision even remotely suggests.

Id. at 413-14 (Stewart, J., concurring).

[129]*See infra* note 130, and *supra* Part III (discussing case law based on both contract and equity principles as well as the State's legislative response to the get problem).

[130]The various methods include the contractually based resolutions encountered in *Koeppel* and *Avitzur*, the equitably based resolutions encountered in *Perl*, and the highly criticized § 253 of the New York's Domestic Relations legislation containing the "removal of barriers" requirement previously discussed. The Equitable Distribution amendments contained in § 236 of the State's Domestic Relations law is also a method by which the secular government has addressed the get problem. The latter, however, is not the focus of this Comment.

With respect to the contractually and equitably rooted methods, see Zuber, *supra* note 28, at 908 (citing Pfeffer, *supra* note 41, at 489). "The first approach some courts have followed is to provide judicial remedies to enforce the contractual promises of the parties." Zuber specifies that these judicial remedies have, for the most part, constituted "indirect means of enforcement, such as fines, contempt orders or dismissal of cross-motions" as opposed to orders of specific performance which inevitably implicate First Amendment issues. *Id.* "Second, some courts have applied contract principles to enforce

and equitably based methods have embraced solutions to already manifested disputes implicated by the withholding of a get, the "get statute," arguably the most controversial method, is capable of characterization as a preventative method whereby the New York legislature has undertaken to minimize the number of civil suits arising over the get laws.[131]

B. ESTABLISHMENT CLAUSE CONCERNS

It is rudimentary that the purpose of the Establishment Clause is to ensure governmental neutrality with respect to matters of religion and that, in order to remain steadfast to these dictates, the federal government as well

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the provisions of the ketubah . . . it has been found appropriate for a court to enter a specific performance order compelling the husband to deliver a get to his wife or to attend a religious tribunal empowered to arbitrate the get dispute." *Id.* at 908-09; *see also* Sreter, *supra* note 27, at 706-07. Sreter explains the case law as presenting three basic legal theories upon which courts have relied to effectively secure Jewish divorce for agunot. *Id.* The first two theories she lists include the contractual enforcement of actual marriage contracts, or ketubahs, as well as enforcement of any civil contracts entered into by a couple (ie: separation agreements), and the application of equitable principles such as coercion or duress which are utilized when "there is oppressive misuse of the unequal allocation of power between the spouses to terminate their religious marriage." *Id.* The third theory upon which plaintiffs base requests for civil relief, referred to by Sreter, is suit based upon the tort of intentional infliction of emotional distress. *Id.* at 907. She makes clear that the latter theory is the least often employed. *Id.* For a detailed discussion of the various contractual and equitable remedies employed in civilly entertained get disputes, see Nadel, *supra* note 3, at 63-69.

With respect to the "removal of barriers" statement contained in § 253 of New York's Domestic Relations Laws, see Sreter, *supra* note 27, at 714; Nadel, *supra* note 3, at 69.

For a discussion of § 236 of New York's Equitable Distribution laws, see *id.* at 74. "In order to fill in some of the gaps left by the *get* statute, New York . . . added two amendments to its equitable distribution law." *Id.* (citing N.Y. DOM. REL. LAW § 236B (5) (h), (6) (d) (McKinney Supp. 1993)). While emphasizing that § 253 and § 236 "complement each other" rather than the latter replacing the former, Nadel highlights the fact that the "EDL amendments are a significant improvement [to § 253] because they reach cases that are beyond the scope of the *get* statute." *Id.* at 75 (emphasis in original). He goes on to explain that the equitable distribution amendments constitute an improvement over the "get statute" because of their application "to both plaintiffs and defendants in divorce suits, regardless of whether the parties were originally married in a religious ceremony." *Id.*

[131] "With an eye to reducing the litigation over this issue, the New York state legislature enacted legislation (commonly known as the 'Get Law'), which it hoped would solve the problems associated with the refusal of a spouse to cooperate in the giving or acceptance of a get." Zuber, *supra* note 28, at 909.

as individual state governments must refrain from activities that would entail their involvement or affiliation with religious activity.[132] It was out of an organized incorporation of various criteria employed in observance of these commands that the seminal case of *Lemon v. Kurtzman*[133] evolved.[134]

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[132]*See Gillette*, 401 U.S. at 449 (citing Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968); Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947)). In *Grand Rapids*, the Supreme Court reiterated how the Establishment Clause "primarily proscribes 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" *Grand Rapids*, 473 U.S. at 381 (citing Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772 (1973); Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

[133]403 U.S. 602 (1971). The three-pronged test set out in *Lemon* provides these guideposts for conducting an evaluation of the constitutionality of particular legislation under the Establishment Clause: first, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; and finally, the statute must not foster an excessive entanglement with religion. *Id.* at 612-13 (citing Board of Educ. v. Allen, 392 U.S. 236, 243 (1968); *Walz*, 397 U.S. at 674).

[134]In *Grand Rapids*, the Supreme Court was confronted with one of many constitutional challenges to state governmental aid to nonpublic religious schools that have arisen through the years. *Grand Rapids*, 473 U.S. 373, 381 (1985) ("[W]e have often grappled with the problem of state aid to nonpublic, religious schools."). In addressing challenges to two Michigan school programs whereby the public school system financed certain classes for nonpublic school students in nonpublic school classrooms leased by the school district of Grand Rapids, the Supreme Court remarked upon its task of "giv[ing] meaning to the sparse language and broad purposes of the [Establishment] Clause, while not unduly infringing on the ability of the States to provide for the welfare of their people in accordance with their own particular circumstances." *Id.* at 381-82. It then proceeded to instruct that every Establishment Clause analysis must consider the three-prong test articulated in *Lemon* whereby the Court, by consolidation of principles previously enunciated in the area, set forth the "general nature of [judicial] inquiry" under the Establishment Clause. *Id.* at 382. Various opinions of the Court in the years since *Lemon* was initially decided have contributed to a widespread skepticism as to the usefulness of the three-prong standard set forth in that case. The skepticism emanates from statements such as the one made in the *Grand Rapids* decision where the Court, in expressing the method of conducting an Establishment Clause analysis, stated that the test, or prongs, set forth in *Lemon* "must not be viewed as setting [any] precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." *Id.* at 383. Further, the Court has repeatedly professed an "unwillingness to be confined to any single test or criterion in this sensitive area." *See* Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (citations omitted).

For judicial discussions pertaining to the inadequacy of reliance upon *Lemon*, see *Lamb's Chapel*, 113 S. Ct. at 2149 (Scalia, J., concurring) ("[A]fter being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again

A review of jurisprudence in the realm of the Establishment Clause appears to provide ample support for the constitutionality of the New York judiciary's application of contractual and equitable remedies to disputes involving a get.[135] While there are well-settled restrictions upon judicial resolution of religiously related matters,[136] there are methods of judicial determination of religious disputes that have been found to effectively skirt

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. . . ."); *Grumet*, 114 S. Ct. at 2499 (O'Connor, J., concurring) (expressing similar sentiments). For a prognostication of the future of Establishment Clause jurisprudence as well as an explanation of how *Lemon* evolved, see Derrick R. Freijomil, Comment, *Has the Court Soured On* Lemon? *A Look Into the Future of Establishment Clause Jurisprudence*, 5 SETON HALL CONST. L.J. 141 (1994).

[135]For a detailed discussion of New York case law exploring contractual and equitable premises of relief, see *supra* notes 71-118 and accompanying text.

[136]Despite the fact that the literal wording of the First Amendment appears to place restraints only upon congressional or other legislative action respecting or burdening religion, it is established that "judicial involvement in matters touching upon religious concerns [is] also constitutionally limited" and that "courts should not resolve . . . controversies in a matter requiring consideration of religious doctrine." *See* Avitzur v. Avitzur, 446 N.E.2d 136, 138 (N.Y. 1983) (citing Reardon v. Lemoyne, 454 A.2d 428 (N.H. 1982); Jones v. Wolf, 443 U.S. 595, 603 (1979); Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976); Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1968)). The applicability of First Amendment constraints as against the judiciary was succinctly stated in Minkin v. Minkin, 434 A.2d 665, 667 n.3 (N.J. Super. Ct. Ch. Div. 1981), where a New Jersey chancery court, after describing the purposes of both religion clauses, stated that their "prohibition[s] appl[y] to the judiciary as well as the executive and legislative branches of government."

"The [First] Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization." *Jones*, 443 U.S. at 602 (citations omitted). And so, for example, in *United States v. Lee*, the United States Supreme Court confronted the question of whether or not government demands for the payment of social security taxes, and the corresponding receipt of benefits to the pool of contributing taxpayers, violated the Free Exercise Clause of the First Amendment when such payments and receipts allegedly violated the Amish taxpayer's religion. *Lee*, 455 U.S. 252, 254-55 (1982). After acknowledging the parties' adverse positions on the issue of whether or not the Amish citizens' contribution to the social security system would, in fact, "threaten the integrity of [their] religious belief or observance," the Court noted that "[i]t is not within 'the judicial function and judicial competence,' . . . to determine whether appellee or the Government has the proper interpretation of the Amish faith; *'[c]ourts are not arbiters of scriptural interpretation.'*" *Id.* at 257 (emphasis added). Hence, the Court necessarily resorted to accepting the appellee's contention that payment and receipt of social security taxes and benefits was forbidden by their religion. *Id.*

First Amendment transgressions.[137]

For instance, in 1979, in the case of *Jones v. Wolf*,[138] the United States Supreme Court rendered a decision that at least arguably extended the high Court's approval to the New York appellate division decisions in *Koeppel* and *Perl*, cases proclaiming a power of the judiciary to employ ordinary legal propositions in disputes over a get.[139] In *Jones*, the Supreme Court held that a state is constitutionally permitted to apply neutral principles of law to decide disputes regarding church property.[140] *Jones* involved a local church's separation from the hierarchical church organization of which it was previously a member and the resulting dispute between the majority and minority factions over possession and use of the church property following the divergence.[141]

Relying upon the Georgia Supreme Court's "neutral principles of law" approach to resolving church property disputes,[142] a Georgia trial court had

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[137]For a detailed discussion of these methods, see *infra* notes 138-150.

[138]443 U.S. 595 (1979).

[139]The New York court's contentions were that ordinary contractual analyses could supply the bases for orders enforcing promises related to the giving or receiving of a get and that equitable principles such as duress and coercion could supply the basis for a court's refusal to enforce a separation agreement. *See supra* notes 71-118 and accompanying text (discussing the rationales proferred on behalf of these contentions).

[140]*Jones*, 443 U.S. at 595.

[141]*Id.* at 597-98.

[142]The "neutral principles" method found its evolution in a 1968 case wherein the Georgia Supreme Court applied a theory of implied trust to resolve a church property dispute between the Presbyterian Church in the United States ("PCUS") and two local Georgia churches. *Id.* at 599 (citing Presbyterian Church v. Eastern Heights Church, 159 S.E.2d 690 (Ga. 1968)). Although, in theory, an analysis based upon implied trust sounded "neutral" enough, its application entailed the Georgia Supreme Court's passing on whether or not the general church had, as the minority faction alleged, "substantially abandoned" certain of the religion's tenets of faith and practice. *Id.* Based upon its conclusion that this analysis inevitably drew the courts into religious controversies, the United States Supreme Court reversed the state court admonishing it to find another route to resolution of the dispute. *Id.* In doing so, the Supreme Court noted that "there are neutral principles of law, developed for use in all property disputes, which can be applied without threatening an establishment of religion." *Id.* For further discussion of the United States Supreme Court's analysis in *Jones*, see *infra* notes 147-150 and accompanying text.

Concluding, on remand, that its implied trust theory was rendered moot absent the authority to decide whether the general church had, in fact, departed from religious

decided *Jones* on the basis of legal title which was held in the names of trustees for the local church.[143] Most importantly, the trial court concluded that the local church constituted the majority faction, thus availing the majority members of possession and enjoyment of the land despite the fact that those members constituting the minority had contributed funds toward acquisition of the property prior to the dispute.[144] Following the Georgia Supreme Court's determination that the lower court had correctly applied the state's "neutral principles" analysis and its corresponding rejection of the minority members' First and Fourteenth Amendment[145] challenges, the United States Supreme Court granted *certiorari*.[146]

After expressing its recognition of the First Amendment prohibition against civil courts resolving church property disputes on the basis of religious doctrine and practice,[147] the Supreme Court proclaimed a general authority, on the part of civil courts, to decide the question as to which faction of a formerly united church should enjoy possession and enjoyment

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doctrine, the Georgia Supreme Court adopted the "neutral principles of law" approach to deciding church property disputes. *Id.* at 600. In light of a failure to find any basis for an implied trust in favor of the general church upon examination of property deeds, statutory implied trust law and the Book of Church Order, the court awarded property on the basis of legal title. *Id.*

[143]*Id.* at 601.

[144]*Id.* at 597-600. The majority faction consisted of the 164 members of the Vineville Presbyterian Church of Macon who voted, along with the congregation's pastor, to separate from the PCUS. *Id.* at 598. The minority consisted of 94 members who opposed the resolution. *Id.*

[145]The Fourteenth Amendment provides, in pertinent part, that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

[146]Jones v. Wolf, 443 U.S. 595, 601 (1979). The minority members of the Vineville church had originally sought relief in federal court but their action was dismissed for lack of jurisdiction. *Id.* at 598 (citing Lucas v. Hope, 515 F.2d 234 (5th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976)). Subsequent to the federal court's dismissal of their complaint, the minority faction members brought a class action in a Georgia state court. *Id.* at 598.

[147]*See supra* note 136 (discussing the existence of First Amendment limitations upon the judiciary as well as the legislatures).

of property following a division.[148] The Court then concluded that the "neutral principles of law" approach, at least in the domain of church property disputes, was, in fact, consistent with constitutional principles embodied in the First Amendment.[149] Thus, under circumstances where no issue of "doctrinal controversy" is implicated, a court is permitted to rely upon ordinarily resorted to legal principles, such as legal title, to decide a dispute involving church property ownership, use, possession and enjoyment.[150]

The prohibition upon civil court determination of ecclesiastical questions[151] appears to pose little, if any, threat to applications of the "neutral" equity principles utilized in cases such as *Perl*, based as they are upon court refusal to enforce separation agreements containing apparently inequitable concessions obtained solely by a husband's coercive use of his authority to withhold a get.[152] This is so in light of the Supreme Court's acknowledgement that "marginal" civil court review of ecclesiastical decisions for "fraud, collusion, or arbitrariness" does not violate the First Amendment's dictate that civil courts play no role in deciding religious controversies.[153] Similarly then, a court's review of a secular separation

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[148]*Jones*, 443 U.S. at 602. "There can be little doubt about the general authority of civil courts to resolve this question." *Id.*

[149]*Id.* at 602. The court thus held that "a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute." *Id.* at 604.

[150]*Id.* at 605. For additional discussion of *Jones*, and its applicability to the get issue, see *infra* notes 151-161 and accompanying text.

[151]*See* Presbyterian Church In the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 446-47 (1968).

[152]*See infra* notes 153-154 and accompanying text.

[153]*See Presbyterian Church*, 393 U.S. at 447. After declaring the existence of a legitimate state interest in settling property disputes and noting the "special problems [that] arise . . . when these disputes implicate controversies over church doctrine and practice," the Supreme Court went on to expound the Court's approach to handling disputes falling into the latter category. *Id.* at 445. Justice Brennan, writing for the Court, stated that:

> The approach of this Court in such cases was originally developed in *Watson v. Jones* . . . . There, as here, the disputes arose out of a controversy over church doctrine. There, as here, the Court was asked to decree the termination of an implied trust because of departures from doctrine by the national organization. The Watson Court refused, pointing out that it was

agreement or property settlement for suggestions of duress or coercion considered to be improper and legally unenforceable in other contract settings should not be considered violative of the Establishment Clause.[154]

> wholly inconsistent with the American concept of the relationship between church and state to determine ecclesiastical questions.

Id. at 445-46.

Justice Brennan then quoted Justice Brandeis, who wrote on behalf of the Court in Gonzalez v. Archbishop, 280 U.S. 1 (1929), a case presenting a dispute as to whether or not a court could direct the appointment of a person who claimed the right to hold a religious office despite an Archbishop's determination that the individual did not satisfy qualifications of the office. *See id.* at 447. Justice Brandeis, defining the proper role of civil courts in such disputes, stated:

> In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise.

Id. (citation omitted). Arguably, what Justice Brandeis was implicitly stating was that if collusion, or in this case, coercion, duress or other inequitable inducements, formed the basis for a religious tribunal's method of managing a dispute or determining a question, then that decision might be avoided by a civil court. *See* Lawrence M. Warmflash, *The New York Approach to Enforcing Religious Marriage Contracts: From Avitzur to the Get Statute*, 50 BROOK. L. REV. 229, 238-40 (1984); *see also* Gerald F. Masoudi, Comment, *Kosher Food Regulation and the Religion Clauses of the First Amendment*, 60 U. CHI. L. REV. 667, 692 (1993) ("The *Ballard* Court never held that a person with a strong religious conviction that fraud is desirable must be allowed to defraud others." (citing United States v. Ballard, 322 U.S. 78 (1944))).

[154]Sreter presents an interesting discussion of the *Perl* court's rationales for refusing to allow the imposition of tort liability under the theory of intentional infliction of emotional distress when based upon abuse of a husband's veto power over the get. Sreter, *supra* note 27, at 712. Sreter described the court's comfort with refusing to enforce the blatantly inequitable property settlement as well as its uneasiness with extending tort liability as follows:

> While the court in *Perl v. Perl* was willing to strictly scrutinize and set aside the property settlement which was the product of coercion from an oppressive misuse of the religious veto power, it drew the line at liability in tort. . . . The Perl court's second reason for dismissing the tort action was a concern that it would become entangled 'in an exploration of both the validity and sincerity of a position grounded in ecclesiastical law where the intent of the husband [in withholding the get] would be pivotal.'

Id. at 712-13 (citiing Perl v. Perl, 512 N.Y.S.2d 372 (N.Y. App. Div. 1987)).

Constitutional challenges to the "neutral principles" applications in *Koeppel* and *Avitzur*, however, are not as easily resolved. Despite the appeal of a perfunctory application of the principles enunciated in *Jones* for purposes of validating the solutions employed in *Koeppel* and *Avitzur*, a rote application of the "neutral principles" approach to analyzing these solutions fails to address the significant constitutional distinctions between the issues that arise in get litigation and those involving the church property dispute presented in *Jones*. Cognizance of these distinctions requires a parallel understanding of the distinctions between the two classes of "neutral principles" being applied by the courts in New York get litigation, for one is clearly less perilous to First Amendment principles than the other.[155]

Dissimilarly from the dispute in *Jones*, resolution of which required the Georgia courts to determine, according to neutral property law principles, which of two factions of a formerly united church should be given right to possession and use of certain property,[156] the First Amendment dispute that recurrently arises in get litigation that is susceptible to the contractually rooted "neutral principles" approach involves whether or not the secular government may enforce a party's promise to deliver a religious divorce.[157] This is a distinction of consequence since an application of "neutral principles" in this situation,[158] as distinct from the situations presented in both *Jones* and *Perl*, harbors the threat of compelling someone to perform what is indisputably a religious act,[159] in this sense implicating a lucid

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[155]The two classes of "neutral principles" herein referred to are the neutral contract law principles and the neutral equity principles employed in *Koeppel* and *Perl*, respectively. As discussed *infra* in notes 157-160 and accompanying text, the former class tends to be more menacing to the First Amendment freedoms.

[156]*See supra* notes 142-144.

[157]"Lurking in the background of every *get* case receiving judicial consideration is the first amendment problem, whether articulated as a violation of the free exercise clause protecting the husband's individual exercise of religion, or as running afoul of the establishment clause which envisions a secular government." Sreter, *supra* note 27, at 707 (citations omitted).

[158]Referring to the application of "neutral principles" of contract, as opposed to property, law to demand specific performance of a promise to deliver a get.

[159]This is unavoidable with respect to specific performance of contract principles, as well as with § 253 since requirements that a party fulfill a promise to deliver a get or assert that he has removed the get barrier to his wife's remarriage necessarily demand recognition of a "barrier" that is of a solely religious nature as well as requiring some written or oral contact with a religious tribunal in efforts to fulfill the promise or satisfy

potential for mischief under the Establishment Clause.[160] In light of this distinction, resolution of the appropriateness of applying the "neutral principles" approach to get litigation of the *Koeppel* and *Avitzur* class of cases should necessarily be guided by Establishment Clause jurisprudence generally and not solely by the teachings of *Jones*.[161]

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the statutory "barriers to remarriage" requirement.

[160]This effect is not avoided when secular courts employ the indirect means of enforcement discussed by Zuber in lieu of orders which explicitly compel specific performance. *See* Zuber, *supra* note 28, at 908. It is a bedrock principle of constitutional law that Religion Clause jurisprudence looks to the effect of a particular governmental action rather than the ostensible action taken. *Id.* For instance, the Supreme Court has stated:

> It is true that this Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment.

Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1987). In *Lyng*, the Court held that the United States Forest Service's construction of a road which would run through a National Forest traditionally utilized by certain American Indian tribes for religious purposes did not violate the free exercise of those tribes. *Id.* at 442-43. In the course of noting its consistent disapproval of the idea that the Free Exercise Clause requires the government to "conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens," the Court employed language that forcefully indicates the inability of secular government to compel a citizen's performance of a religious act or practice:

> Just as the Government *may not insist that [the Roys] engage in any set form of religious observance*, so [they] may not demand that the Government join in their chosen religious practices . . . .

Id. at 448 (emphasis added).

It should be noted that although the more apparent threat here is to principles having their source in the Establishment Clause, a court's application of coercion to gain a husband's cooperation in obtaining a get may also be considered an infringement of his Free Exercise rights to employ his religiously emanating discretion to withhold a get from his wife. For a more detailed discussion of the Free Exercise issues at stake, see *supra* notes 206-240 and accompanying text.

[161]As already indicated, the Supreme Court has succinctly stated that the First Amendment prohibits civil courts from resolving civil lawsuits by methods entailing any determinations of religious doctrine. *See supra* note 136 and accompanying text. It has been asserted, in light of this prohibition, that judicial enforcement of promises or agreements relating to the delivery of a get tends mostly to implicate a threat to the "excessive entanglement" prong of *Lemon*. *See* Warmflash, *supra* note 153, at 238 (citing

The Supreme Court has made it clear that government compelled participation in religious activity violates the Establishment Clause, such infractions being classified as "advancements" of religion invalid under the second prong of *Lemon*.[162] Although it has been contradicted, a court

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Presbyterian Church In the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1968); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724-25 (1976)). It has also been noted that, evaluated under this assumption, the holdings in *Koeppel* and *Avitzur* are in harmony with the dictates of the Establishment Clause because such cases do not generally require a court to make any determination as to a doctrinal dispute *per se*. Warmflash, *supra* note 153, at 238-41. It is true that disputes over a wife's inability to obtain a get are not the result of any disagreement as to the husband's religious authority to withhold the religious divorce so much as they are a protest to the tenet itself as well as the harsh results which that tenet breeds in separation negotiations. In fact, Orthodox Jewish wives ordinarily concede the fact that their religion bestows upon their husbands the complete discretion with respect to granting a divorce. It is exactly this recognition of the male's religious "veto power" that precipitates the get controversies and the beseechment of civil court intervention. The absence of a "doctrinal controversy," however, should not conclude an Establishment Clause analysis of judicial enforcement of agreements to tender a get.

[162]In *Braunfeld*, the Supreme Court, faced with a Free Exercise challenge to a Pennsylvania statute making it a criminal offense to sell certain enumerated commodities on a Sunday, declared that:

> Certain aspects of religious exercise cannot, in any way, be restricted or burdened by either federal or state legislation. Compulsion by law of the acceptance of any creed *or the practice of any form of worship* is strictly forbidden.

Braunfeld v. Brown, 366 U.S. 599, 603 (1960) (emphasis added). The challenge was presented by Orthodox Jewish followers who observed their Sabbath on Saturday and who argued that the statute, as applied to them, would completely preclude their commercial competition in the market since they would effectively be forced to remain closed on two, rather than one, days of the week. *Id.* at 601-02. The Court ultimately found that the statute in question did not violate the Free Exercise Clause of the Constitution because it did not, as the appellants had contended, force them to believe, say or do anything in conflict with their religious tenets. *Id.* at 603.

What the *Braunfeld* opinion makes clear is that governmental action that forces a person, or group of persons, to "embrace any religious belief or to say or believe anything in conflict with his religious tenets" is a violation of the Establishment Clause. *Id.* This prohibition was alluded to in Justice Rehnquist's dissenting opinion in *Larkin* where the Justice castigated the majority's determination that a Massachusetts zoning law, that vested the governing bodies of churches and schools with authority to file objections to proposals that establishments serving alcoholic beverages be located within five hundred feet of their premises, unconstitutional due to its sharing of "significant governmental authority" with churches. Larkin v. Grendel's Den, Inc., 459 U.S. 116, 117, 126-28 (Rehnquist, J.,

ordered directive for a party to deliver a religious bill of divorce, even if based on "neutral principles" of contract law such as specific performance, constitutes forced participation in a religious activity.[163] The already

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dissenting) (1982). Specifically, Justice Rehnquist stated that "[d]issenting opinions in previous cases have commented that 'great' cases, like 'hard' cases, make bad law. Today's opinion suggests that a third class of cases — silly cases — also make bad law." *Id.* at 127-28. Recognizing that, as part of its police powers, the Massachusetts legislature could, constitutionally, have approved of "an absolute legislative ban on liquor outlets within reasonable prescribed distances from churches, schools, hospitals, and like institutions," Justice Rehnquist viewed the actually selected approach taken by the legislature to be a "more flexible" and less intrusive one since it only required licensing denials if a particular church or school chose to enter an objection. *Id.* at 128-29. Justice Rehnquist then continued by proffering that:

> [T]he Court indicates a belief that § 16C effectively constitutes churches as third houses of the Massachusetts Legislature. Surely we do not need [the] three-part [Lemon] test to decide whether the grant of actual legislative power to churches is within the proscription of the Establishment Clause of the First and Fourteenth Amendments. The question in this case is not whether such a statute would be unconstitutional, but whether § 16C is such a statute. The Court in effect answers this question in the first sentence of its opinion without any discussion or statement of reasons. I do not think the question is so trivial . . . .

Id. at 129. Following his statement of discontent with the Court's desultory analysis of the Establishment Clause challenges, the Justice then made categorical style reference to governmental actions that would conclusively constitute First Amendment violations under that clause. *Id.* The Justice proclaimed, "Section 16C does not sponsor or subsidize any religious group or activity. It does not encourage, *much less compel*, anyone to participate in religious activities or to support religious institutions. To say that it 'advances' religion is to strain at the meaning of that word." *Id.* (emphasis added). Thus, even under a more flexible reading of the Establishment Clause, such as the one espoused by Justice Rehnquist in *Larkin*, governmental action that effectively compels participation in religious activity is a readily discernible First Amendment violation. *See id.*

[163]There is case law concluding that the ordering of specific performance of ketubahs or other agreements requiring a defendant husband to obtain and deliver a Jewish bill of divorce does not compel performance of a religious act or fulfillment of a religious duty. *See, e.g.*, Avitzur v. Avitzur, 446 N.E.2d 136, 136-38 (N.Y. 1983) (stating that specific enforcement of a promise to appear before and accept the decision of a rabbinical tribunal does not contemplate "implementation of a religious duty"); Minkin v. Minkin, 434 A.2d 665, 666 (N.J. Super. Ct. Ch. Div. 1981). In *Minkin*, a husband was ordered to secure a get pursuant to the court's determination that specific performance of the couple's Jewish marriage contract, or ketubah, would not violate any public policy of the State nor compel the husband's "practice [of] any religion" or "profession of faith." *Id.* at 666. The *Minkin* court concluded that since the objective of a ketubah is to "promote a successful

marital relationship," its enforcement would advance the public policy of marriage. *Id.* Relying on language identical to that found in Avitzur the New Jersey court stated that specific performance of the ketubah would "simply call[] for [the] defendant . . . to do that which he agreed to do." *Id.* Thus, in line with a New Jersey equity court's general practice of enforcing any contract that is not unconscionable or contrary to public policy, the court determined to enforce the ketubah. *Id.*

As Nadel points out, cases such as *Minkin* are founded upon Orthodox wives' efforts to base allegations of promises to deliver a get upon the wording of the ketubah wherein the parties agree to "conform to the 'laws of Moses and Israel.'" Nadel, *supra* note 3, at 65.

Laudably, the *Minkin* opinion, at least on its face, does not evidence equivocation as to the First Amendment issues presented by the prospect of specific performance of a get related promise. *Minkin*, 434 A.2d at 666-68. Noting the need to address the First Amendment questions presented in the case, the *Minkin* court stated, "To determine whether enforcing the marriage contract would violate the three-prong [*Lemon*] test, and because 'this issue is one of the most sensitive areas in the law,' the court on its own motion requested the testimony of several distinguished rabbis well versed in Jewish law" on the issue of whether or not the acquisition of a get is a "religious act." *Id.* at 667.

Despite its commendable attempt at disposal of the First Amendment challenges, the reasoning employed in *Minkin* is flawed from both a First Amendment as well as a general perspective. Firstly, while the court advanced the argument that specific enforcement of the ketubah would further the "clear secular purpose of completing dissolution" of a marriage, the truth of the matter is that dissolution of a marriage is complete, at least in the eyes of secular law, subsequent to receipt of a civil divorce decree. In its opinion in *Avitzur*, the New York Court of Appeals candidly remarked that "nothing [a] Beth Din can do would in any way affect [a] civil divorce." *Avitzur*, 446 N.E.2d at 138. That quote embodies the appropriate separation of church from state affairs that has been the goal of the religion clauses.

It was most likely an endeavor to remain loyal to the wall of separation concept that inspired a majority of the lower court in *Avitzur* to conclude that there was absolutely no secular basis for enforcement of a promise to obtain a get. *See* Sreter, *supra* note 27, at 709. Arriving at a completely opposite result from that of the Court of Appeals, the lower court found, "The State, already having granted the parties a civil divorce, has no further interest in their marital status. It would thus be a dangerous precedent to allow State courts to enforce liturgical agreements concerning matters about which the State has no remaining concern." *Id.* (quoting *Avitzur*, 449 N.Y.S.2d at 84). Despite the fact that the Court of Appeals came to the opposite result, concluding in favor of specific performance, the lower court's comments concerning the complete lack of interdependence between the secular and religious divorces is applicable to the *Minkin* court's contention that specific performance of these agreements is in the interests of a secular purpose of dissolving a marriage. It is an infallible conclusion that this contention simply cannot be supported.

A 1966 case entitled *Turner v. Turner*, although decided on legislative rather than First Amendment grounds, is also illustrative of the fact that civil divorce is unaffected by religious divorce. Turner v. Turner, 192 So.2d 787 (Fla. Dist. Ct. App. 1966). In *Turner*, a Florida District Court of Appeal determined that a circuit judge had no authority to order an Orthodox Jewish husband to participate in acquisition of a get. *Id.* In providing a basis for its decision the Florida court related that "[t]he statutes of the State

of Florida . . . provide only for one kind of divorce; that is, a civil divorce 'from the bonds of matrimony.' An examination of the statute reveals that there is no authorization for a chancellor to require the parties to secure a religious divorce." *Id.* at 788. Particularly noteworthy for purposes of this discussion was the *Turner* court's labelling of the get process as a "religious ceremony." *Id.* at 788-89.

Furthermore, an explication of the process of effectuating an Orthodox Jewish divorce is, on its own, illustrative of the religious nature of obtaining a get:

> Divorce is carried into effect by the bill of divorcement being written, signed, and delivered by the husband to his wife. It is written by a scribe upon the husband's instruction to write "for him, for her and for the purpose of a divorce." The materials used in the writing must belong to the husband and the scribe formally presents them as an outright gift to the husband before writing the Get.

Minkin, 434 A.2d at 665 n.1 (citing 6 ENCYCLOPEDIA JUDAICA, 132 (1971)). As already referred to, the procedural technicalities involved in both execution and delivery of a get are such that it is "virtually impossible to divorce" without the guidance of a rabbinical tribunal. *See supra* note 27. It is illogical to conclude that a participation in a "procedure" so intensely bound up with religious rules and formality could be considered anything but coercion to perform a religious act.

Secondly, the *Minkin* court's analysis involves the support it provides for its ultimate determination that enforcing ketubahs is a good policy since the purpose of the ketubah coincides with a strong state interest of advancing marriage. The court based its determination upon a conclusory reference to the fact that ketubahs are generally drafted in favor of promoting successful marriages. *Minkin*, 434 A.2d at 666. Ironically, however, the *Minkin* court condoned specific performance of the ketubah as a basis for ensuring the accomplishment of a religious divorce, a provision having nothing at all to do with promotion of successful marriages. The court tenders no insight whatsoever as to how enforcement of a ketubah facilitates the state interest in encouraging marriages when the enforcement of a ketubah is sought only to enforce a promise to divorce.

Thirdly, the *Minkin* court's method of resolving the dispute, so as to reach a result it was apparently predisposed toward, itself tends to violate the previously mentioned First Amendment rules pertaining to judicial resolution of religious disputes. *See supra* notes 147-150 and accompanying text. It must be recalled that in *Jones* the Supreme Court was wary to emphasize the First Amendment barrier to civil courts resolving disputes on the basis of religious doctrine and practice (as opposed to neutral property law principles). *Jones*, 443 U.S. at 602 (citations omitted). This prohibition constitutes a ban on any "inquiry into religious doctrine." *Id.* at 603. It was exactly this prohibition, geared toward precluding the type of excessive entanglement forbidden under the third prong of *Lemon*, that mandated the Supreme Court's acceptance of the Amish appellee's assertion, in *United States v. Lee*, that payment and receipt of social security benefits would, in fact, threaten the integrity of their beliefs and observance. United States v. Lee, 455 U.S. 252, 257 (1982). The Court in that case stated, "It is not within 'the judicial function and judicial competence,' . . . to determine whether appellee or the Government has the proper interpretation of the Amish faith; '[c]ourts are not arbiters of scriptural interpretation.'" *Id.* The *Minkin* court's conclusion, based on various rabbis' testimony,

that execution and delivery of a get is not a religious act violates this fundamental rule because it does pass judgment on a religiously debatable issue. Although it attempted to persuade otherwise, the *Minkin* court was not presented with uncontradicted testimony such as was presented in *Wisconsin v. Yoder*, where the respondents proffered a series of expert religious scholars who confirmed the respondents' claims that sending their children to high school would endanger theirs and their childrens' salvation. *See Yoder*, 405 U.S. at 209-10. The expert testimony in *Yoder* was uncontradicted. *Id.* at 210. Although attempting to palliate the fact, the *Minkin* court did disclose that the testimony of at least one rabbi did contain the opinion that the acquisition of a get is, in fact, a religious act. *Minkin*, 434 A.2d at 667. The court's method of dealing with this testimony was to mitigate its weight, basing the diminution in weight upon the rabbi's own admission that the other rabbis who testified were "far better Jewish scholars" than he. *Id.* This means of disposing of testimony injurious to the court's conclusion that participation in the "get procedure" is not a religious act is constitutionally deficient. *Id.* Chances are that there exist many other rabbis who would, in line with the dissenting rabbi in *Minkin*, attest to a conclusion that the process for obtaining a get is a religious act. If settled doctrine forbids a civil court to make the determination as to what is or is not religious practice, the *Minkin* court's analysis may be rendered constitutionally unsound since its holding is partly based upon the court's settlement of a religious dispute, based not upon "neutral principles" of law, but upon expert religious testimony which the court itself weighed. *See* Feldman, *supra* note 4, at 151 (expressing the view that the *Minkin* and *Stern* courts were "expressly passing on matter of religious doctrine" in construing an "Orthodox ketubah" to have civil meaning in the absence of any specific clause concerning divorce or arbitration).

It has been noted that, generally, courts are reluctant to conduct any detailed inquiry into whether or not a ketubah is a purely liturgical, as opposed to civil, agreement. Redman, *supra* note 23, at 401. Such reluctance is owing to a fear that such inquiries will involve them in "resolving doctrinal issues, an improper role for secular courts." *Id.* (citations omitted). Analogously, court inquiry into whether or not the giving of a get is or is not a religious act presents the identical threat of entanglement.

It is also questionable whether the type of expert testimony provided in *Minkin* can be found to override a First Amendment claimant's allegation that he, himself, considers participation in the get process to be a religious act. The Supreme Court has underscored its First Amendment ruling that "'the 'truth' of a belief is not open to question'; rather, the question is whether the objector's beliefs are 'truly held.'" *See* Gillette v. United States, 401 U.S. 437, 457 (1971) (quoting United States v. Seeger, 380 U.S. 163, 185 (1965)). The *Gillette* Court additionally stated that government involvement in the classification of what is or is not "religious" would result in the type of entanglement forbidden under the Establishment Clause. *See Gillette*, 401 U.S. at 457 (quoting Walz v. Tax Comm'n., 397 U.S. 664, 698-99 (1970)). This cardinal principle was also addressed in *Sherbert* where the Court found that a state could not apply the eligibility provisions of its unemployment compensation act in a manner that constrained a person to select between receiving such benefits or practicing his religion. Sherbert v. Verner, 374 U.S. 398, 410 (1962). In dismissing the Employment Security Commission's suggestions that prior interpretations of the law should be found constitutionally sound in the interest of precluding fraudulent claims of religious objections to certain work, the Court explained:

apparent Establishment Clause concerns are exacerbated by contemplation of the possible situation where a former adherent to the Orthodox Jewish faith determines to no longer engage in that, or perhaps any, religious practice.[164] All of the foregoing advance the conclusion that, although *Jones* certainly contributed a valuable means of disposing of certain religiously related disputes, close scrutiny of the differing results of various applications of the "neutral principles" approach cautions against extensions of *Jones* that would countenance violation of the First Amendment so long as there is some arguably "neutral principle" with which to cloak the infraction.

There is no doubt that the aforementioned constitutional barriers likewise apply to enforcement of section 253 of the New York Domestic Relations laws.[165] Nonetheless, a constitutional evaluation of section 253 warrants an analysis of how that statute, alone, would fare under each of the

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> [T]here is no proof whatever to warrant such fears of malingering or deceit as those which the respondents now advance. *Even if consideration of such evidence is not foreclosed by the prohibition against judicial inquiry into the truth or falsity of religious beliefs* . . . it is highly doubtful whether such evidence would be sufficient to warrant a substantial infringement of religious liberties.

Id. at 407 (emphasis added). It should be noted that this same prohibition would also support an argument that an Orthodox woman should not be constitutionally permitted to argue that her spouse was withholding a get out of malice rather than due to some religiously based reason. Thus, although there is certainly a requirement that a claimant seeking the protection of the Religion Clauses offer a claim "rooted in religious belief," determinations as to what is, or is not, a religious belief are severely circumscribed. *See Yoder*, 406 U.S. at 215.

[164]In *Minkin*, the wife's complaint for specific performance of the ketubah specifically alleged that her husband was still a practicing member of the Orthodox Jewish faith. *Minkin*, 434 A.2d at 666. The New Jersey Chancery Court took specific note of that fact in the opinion, thereby alluding to the fact that a person's abandonment of religious practice would, in fact, have bearing on the First Amendment challenges to specific performance orders, arguably making the challenges more likely to succeed. *Id.*

[165]This is so in light of the fact that § 253, when applied as against a Jewish Orthodox man seeking a civil divorce in New York, effectively compels him to engage in the process of securing a get, thereby giving rise to the identical concerns applicable to judicial enforcement of contracts wherein a husband has promised to deliver a get.

three prongs of the *Lemon* framework.[166] It can be discerned at the outset,

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[166]As previously stated, the three-part test articulated in *Lemon* "guides '[t]he general nature of'" an Establishment Clause inquiry. School Dist. of the City of Grand Rapids v. Ball, 473 U.S. 373, 382 (1985) (quoting Mueller v. Allen, 463 U.S. 388, 394 (1983)); *see also* Larkin v. Grendel's Den, 459 U.S. 116, 123 (1982) ("This court has consistently held that a statute must satisfy three criteria to pass muster under the Establishment Clause . . . ."); Bowen v. Kendrick, 487 U.S. 589, 602 (1987) ("[W]e assess the constitutionality of an enactment by reference to the three factors first articulated in *Lemon v. Kurtzman* . . . .").

Attention has been given to the fact that § 253 is facially devoid of any discriminatory language. *See, e.g.*, N.Y. DOM. REL. LAW § 253 (McKinney 1986) (Practice Commentary C253:1: Background and Constitutionality). The statute's own commentary contains candid argument that, despite the legislation's appearance of neutrality, the "avowed purpose [was] to curb . . . the withholding of Jewish religious divorces . . . by spouses acting out of vindictiveness or applying economic coercion." *Id.* (citation omitted). The commentary remarks upon the "ostensibly neutral language" of the statute since "the statute makes no express references to Jewish religious divorces or Jewish religious tribunals." N.Y. DOM. REL. LAW § 253 (McKinney 1986) (Practice Commentary C253:1: Background and Constitutionality). The commentary further argues that "[t]he absence of references to Jewish religious practices was hardly unintentional," insinuating that the New York legislature was perfectly aware of the threat that it might cross the fine line between church and state. *Id.*

Section 253 is not, however, protected against rigorous First Amendment scrutiny of its "neutrality" merely because of statutory equivocation on the part of the New York legislature. Since one of the central purposes of the Establishment Clause was to ensure governmental neutrality in matters of religion, the Supreme Court has adhered to a rule against concluding any neutrality inquiry based upon observation that a statute makes no discriminations between religions on its face. *Gillette*, 401 U.S. at 452. Rather, "the Establishment Clause forbids subtle departures from neutrality, 'religious gerrymanders,' as well as obvious abuses." *Id.*

In light of the legislature's clever omission of facially discriminatory language, the get statute will likely escape the type of facial denominational preference argument to which some Jewish kosher statutes have been subjected. *See* Masoudi, *supra* note 153, at 675-76. In his article, Masoudi identifies a New Jersey kosher food regulation making it unlawful to sell or offer for sale:

> any food or food product which is falsely represented to be kosher, Kosher for Passover, under rabbinical supervision, pareve or as having been prepare under and/or with a product sanctioned by Orthodox Jewish religious requirements" and defining 'kosher' as "prepared and maintained in strict compliance with the laws and customs of the Orthodox Jewish religion, as an example of facial denominational preference unquestionably violative of the 'clearest command of the Establishment Clause . . . that one religious denomination . . . not be officially preferred over another."

Id. at 673-76. (citing, N.J. ADMIN. CODE tit. 13, § 45A-21.1,2. (1990); Larson v. Valente, 456 U.S. 228, 244 (1982)). For a discussion of the distinction between a facial

however, that enforcement of section 253 is comparatively more offensive to the Establishment Clause than is employment of the "neutral principles" doctrine since the latter merely enforces a party's voluntarily assumed obligations to another while the former acts to withhold civil benefits[167] unless a party undertakes to perform a religious act.[168]

Under the *Lemon* standard, legislation is invalid if it is wholly motivated by an impermissible purpose, if its primary effect is to advance or endorse religion or if it requires excessive entanglement between church and

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preference analysis and a *Lemon* analysis, see generally Masoudi, *supra* note 153, at 667.

[167]In these cases, the civil benefit is a divorce decree as opposed to workers compensation benefits or similar benefits distributed pursuant to a state or federal program such as in other Religion Clause cases. *See, e.g.*, *Sherbert*, 374 U.S. at 398 (state withholding of workers compensation benefits).

[168]Justice O'Connor, in agreeing with the proposition that the Establishment Clause does not command hostility to religion, has remarked that "[a]bsent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2497 (1994) (O'Connor, J, concurring in part and concurring in the judgment). The Justice adamantly added that "the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community." *Id.* at 2497-98.

Grumet dealt with the issue of whether or not a New York legislative zoning act, providing that a village inhabited by "vigorously religious" people constituted its own separate school district and, thereby, enabling it to "have and enjoy all the [corresponding] powers and duties of a union free school district," was an unconstitutional establishment of religion. *Id.* at 2486 (citation omitted). The bill was passed as part of what Governor Cuomo called a "good faith effort to solve . . . unique" educational problems regarding the schooling of handicapped children in the village who, prior to the law's passage, needed to attend public schools away from their religious friends and family in order to obtain the special educational services to which state and federal law availed them. *Id.* A majority of the Court, including Justice O'Connor, concluded that the legislation violated the Establishment Clause of the United States Constitution due to its delegation of political power to an "electorate defined by common religious belief and practice, in a manner that fails to foreclose religious favoritism." *Id.* at 2494.

While § 253 of New York's Domestic Relations laws does not concern the vesting of political power in a religiously defined electorate, it does, effectively, contain a flat out denial of a civil divorce decree to those men who are New York plaintiffs in a civil divorce proceeding unless they participate in the get procedure which, as already argued, is, in all reality, a religious act. *See supra* notes 159-163, and accompanying text. The legislation is, thus, vulnerable to an attack under the legal proposition that government may not make adherence to religion relevant to a person's standing in the community since a person who fails to participate in a religious act can be refused a civil divorce decree.

state.[169] Although a highly persuasive argument can be presented that the New York legislature's purpose in enacting section 253 was a "wholly impermissible" one,[170] it is more than likely that the government would prevail under this prong of *Lemon* since, traditionally, it is neither difficult for a legislature to conceive a secular interest on behalf of particular legislation nor to legally satisfy the secular purpose prong of the test.[171]

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[169]*See Bowen*, 487 U.S. at 602 (citing Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 708 (1985); Lynch v. Donnelly, 465 U.S. 668, 680 (1984); Stone v. Graham, 449 U.S. 39, 41 (1980); Lemon v. Kurtzman, 403 U.S. 602, 613 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 664 (1970)).

[170]In fact, many commentators straightforwardly allege that the New York "Get" statute and EDL Amendments have no goal other than to coerce Jewish Orthodox husbands to deliver a Jewish divorce. *See, e.g.*, N.Y. DOM. REL. LAW § 253 (McKinney 1986) (Practice Commentary C253:1: Background and Constitutionality).

> Although the statute is phrased in ostensibly neutral language, its avowed purpose is to curb what has been described as the withholding of Jewish religious divorces, despite the entry of civil divorce judgments, by spouses acting out of vindictiveness or applying economic coercion . . . . The statute seeks to provide a remedy for the "tragically unfair" situation presented where a Jewish husband refuses to sign religious documents needed for a religious divorce. DRL 253 is really designed to induce or compel Jewish spouses, especially men, to "voluntarily" accede to religious divorces or else be precluded from obtaining a civil divorce decree. The statute . . . singles out Jewish religious practices by confining itself to "voluntary acts," excluding applications to religious marriage tribunals. Thus, the statute is expressly limited to a "voluntary act," i.e., the giving by a Jewish husband of a "Get".

Id. (citation omitted). Viewed with appreciation of the fact that § 253 tends primarily to affect Jewish Orthodox males who seek civil divorce decrees, the statute would seem to violate the pivotal commands of the Establishment Clause which "stands at least for the proposition that when government activities touch on the religious sphere, they must be secular in purpose, *evenhanded in operation*, and neutral in primary impact." *See Gillette*, 401 U.S. at 450 (emphasis added).

[171]There is prevalent recognition of the indulgence with which courts evaluate fulfillment of the "secular purpose" prong of *Lemon*. *See, e.g.*, Feldman, *supra* note 4, at 156-57. Feldman notes that "the secular purpose test, as set forth by the Supreme Court, is a very generous one. If there is at least some arguable secular purpose behind a law, it will survive. The Court will even look for a secular purpose on its own." *Id.*

More importantly, perhaps, is that the "secular purpose" prong of *Lemon* has been interpreted to require merely that a secular purpose have existed for passing the law and not that the legislation be devoid of any and all religious motivations. *See* Lynch v. Donnelly, 465 U.S. 668, 681 (1984); *see also Bowen*, 487 U.S. at 603 (discussing a

While New York may conceivably propose a handful of secular state interests in support of section 253, it is more than safe to assume that it will, at least, offer the two particular objectives that have already been identified, in the case law and legislative history, to be the catalyst behind the legislation.[172] These are the goals of facilitating the state interest in marriage and of precluding use of the civil courts to enforce fraud and coercion.[173] Examination of both these interests, however, reveals constitutional deficiencies.[174]

It is unavoidable but to concede that states do, traditionally, enjoy discretion with respect to the governance of the institution of marriage.[175] Logically, then, they possess a corresponding interest in facilitating re-

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district court's approval of a statute that was partly motivated by improper concerns in light of the existence of other, entirely legitimate secular concerns). Thus, the secular purpose need not be to the exclusion of all other purposes, religious ones included. *See id*; *see also* Redman, *supra* note 23, at 411 (commenting, based upon the Court's decision, to uphold Maryland's "Sunday closing law," that "[r]arely has the Supreme Court invalidated a facially neutral statute that was passed with the legislative intent to aid religion" (citing McGowan v. Maryland, 366 U.S. 420 (1961))).

[172]*See infra* note 173 and accompanying text.

[173]For a more detailed explanation of these state interests, see *supra* notes 71-118 and accompanying text.

[174]For a discussion of these deficiencies, see *infra* notes 175-205 and accompanying text. In exploring the validity of New York's proposed secular interests one must keep in mind that governmental "control . . . cannot be sustained on the ground that the government disagrees with the religion in question; the government must instead point to a secular purpose to justify its regulation." TRIBE, *supra* note 124, at 1205.

[175]In Reynolds v. United States, 98 U.S. 145 (1878), the Supreme Court stated that:

> [I]t is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal . . . . It is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.

Id. at 165.

marriage.[176] However, to base a holding as to the constitutionality of section 253, upon a state's interest in marriage is to both neglect the fact that the parties are civilly authorized to re-marry[177] and to open the door to any contention that a specific religion's tenet can be overridden by the government if it tends to dissuade its adherent against marriage.[178]

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[176]*See* Redman, *supra* note 23, at 410 (discussing the "clearly secular purpose of promoting remarriage" that underlies § 253 of New York's Domestic Relations Laws).

[177]It is necessary to an examination of the validity of the first of the secular interests proffered by the State of New York, to underscore the fact that, in the get arena, it is solely a religious conviction that introduces the barrier to re-marriage. *See* Sreter, *supra* note 27, at 716-18 (observing other commentators' conclusions that "since a civil divorce leaves both parties free to remarry in the eyes of the state," the only purpose of the get statute "is to facilitate marriage within the religion"). Since it has been determined that "the First Amendment enjoins the employment of organs of government for essentially religious purposes," it appears that § 253 is, in fact, violative of First Amendment dictates. Presbyterian Church In the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1968). Arguably then, the state interest in marriage is fully accommodated by a civil divorce decree which permits civil recognition of any re-marriage irrespective of the receipt or non-receipt of a get.

Furthermore, the entire principle of a "separation of church and state" is premised upon a belief that there should be:

> [A] spirit of freedom for religious organizations, an independence from secular control *or manipulation*-in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.

Id. at 448 (citing Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952) (emphasis added).

[178]Exemplifying this concern is language from the early case of Watson v. Jones, 13 Wall. 679 (1872), quoted by the Court in *Presybterian Church* in order to elucidate the extent of the prohibition against civil courts determining religious controversies:

> "All who unite themselves to such a body (the general church) do so with an implied consent to (its) government, and are bound to submit to it. But it would be a vain consent and *would lead to the total subversion of such religious bodies*, if any one aggrieved by one of their decisions could appeal to the secular courts and have them (sic) reversed."

Id. at 446 (citing *Watson*, 80 U.S. (13 Wall.) at 728-29 (emphasis added)). It is far from an unreasonable interpretation of these words, that faithfully convey the goals of the First Amendment, to propose that the *Watson* Court would have similarly rebuked an attempt, on the part of civil courts or legislators, to relieve an aggrieved religious follower of an imposition occasioned by one of their religion's tenets or of a decision by a religious

The second interest which would presumably be offered to justify section 253 is that of preventing the fraud, coercion and duress that has been occasioned by Orthodox Jewish husbands' who indecorously use their religious "veto" power over the get to obtain inequitable civil settlement concessions from their wives.[179] This second interest will be the subject of a more difficult prong one challenge since an alternative means of addressing that problem has already been presented and arguably sanctioned by the Court.[180] The Supreme Court does not tend to look favorably upon a potentially infringing statute supported by secular objectives that can readily be accomplished by other means.[181] Nonetheless, since it does not require a fantastic feat for a legislature to satisfy this first prong of *Lemon*, New York's asserted interests in both marriage as well as the prevention of

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tribunal to which they have voluntarily submitted.

A hypothetical extension of New York's argument that § 253 is constitutionally sound because it tends to facilitate marriage illustrates the bizarre results that might be sanctioned if the argument were taken to its logical conclusion. One could imagine the situation where some crafty state legislature, employing neutral language, might effectively eradicate the dogma of priesthood celibacy from those religions adhering to it because the tenet clearly discourages priests from engaging in marital relations. Though clearly supposition, the point to be made is that upholding the constitutionality of statutes such as § 253 opens the door to a host of legislative claims that a state's interest in marriage could excuse what would otherwise be a First Amendment infringement. As the Supreme Court has employed conjecture to illuminate its rationale in past opinions, this type of supposition should not be viewed as inappropriate to evaluating the New York legislature's proposed state interests under *Lemon*. *See, e.g.*, *Reynolds*, 98 U.S. at 163, 166 (concluding, in the context of a Free Exercise analysis, that the legislature can interfere with professed religious practices, such as polygamy, that constitute "acts against peace and good order").

[179]For a discussion of this use of the "veto" power, see *supra* notes 44-49 and accompanying text.

[180]*See supra* notes 151-154 and accompanying text (discussing the "neutral principles" of contract and equity law that have been applied by courts in refusing to enforce inequitable settlement arrangements obtained by religiously related coercion) and *infra* note 181.

[181]*See, e.g.*, Larkin v. Grendel's Den, 459 U.S. 116, 123-24 (1982). Furthermore, as already observed, civil courts can adjudicate and protect parties' rights against fraud and coercion without ever involving themselves in church doctrine "simply by engaging in the narrowest kind of review of [separation agreements and property settlements] . . . i.e., whether that decision resulted from fraud, collusion, or arbitrariness. Such review does not inject the civil courts [or legislatures] into substantive ecclesiastical matters." *Presbyterian Church*, 393 U.S. at 451. When such avenues of promoting a state interest are available, they should be pursued prior to enactment or employment of a statute that inculpates legitimate First Amendment challenges.

fraud will probably enable section 253 to endure even the most fervid prong one attack.[182]

As has been recognized to so often be the case, the New York statute will confront its most arduous challenge under the "secular effects" prong of *Lemon*.[183] While it is conclusively confirmed that the Establishment Clause prohibits direct forms of government financing or sponsoring of indoctrination into religious beliefs,[184] the clause has likewise never been confined to preclusion of direct aid to religion.[185] Rather, it imposes absolute barriers to any sort of governmental participation in the affairs of religious entities or groups.[186]

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[182]*See supra* note 171 and accompanying text.

[183]In *Bowen*, for example, both Chief Justice Rehnquist and Justice Blackmun made reference to the fact that the rigor of the *Lemon* test is contained in the test's second requirement. Chief Justice Rehnquist, on behalf of the Court, wrote that, "[a]s usual in Establishment Clause cases[,] . . . the more difficult question is whether the primary effect of the challenged statue is impermissible." *Bowen*, 487 U.S. at 604. Justice Blackmun reiterated this observation, noting "[a]s is often the case, it is the effect of the statute, rather than its purpose, that creates Establishment Clause problems." *Id.* at 634 (Blackmun, J., dissenting).

[184]Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 385 (1985).

[185]The Supreme Court made this point quite clear in *Grand Rapids* where it specifically stated:

> Our cases have recognized that the Establishment Clause guards against more than direct, state-funded efforts to indoctrinate youngsters in specific religious beliefs. Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any-or all-religious denominations as when it attempts to inculcate specific religious doctrines.

Id. at 389 (citing Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

[186]Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. at 2488; *see also Grand Rapids*, 473 U.S. at 381 (discussing its interpretation as to the breadth of governmental limitations contained in the Establishment Clause, by stating that "[t]he Establishment Clause . . . primarily proscribes 'sponsorship, financial support, and active involvement of the sovereign in religious activity'" (quoting *Nyquist*, 413 U.S. at 772)). The scope of Establishment Clause prohibitions is properly viewed to be broad since its underlying purposes are themselves broad. *See id.* at 381-82 ("In all of these cases, our goal has been to give meaning to the sparse language and broad purposes of the [Establishment] Clause . . . .").

Despite these repeated and intelligible identifications of a First Amendment ban on government aid to religion, it has been presumptuously stated that so long as public policy favors the ability of parties to remarry, that "the state should aid a wife in obtaining a get when her adherence to the tenets of orthodox Judaism prevents her from remarrying without one."[187] Such a statement cannot be reconciled with the case law.[188]

The mandates contained in the Establishment Clause have been construed to embrace a bar against any state or federal legislation which aids religion in general, aids one religion in particular or prefers one religion over another,[189] each of these representing different forms of advancement, or endorsement, of religion.[190] Unquestionably section 253 can be perceived, at least, to be an endorsement of religion generally since the statute tends to make a statement as to the significance of complying with religious tenets.[191] It does so by legislatively attempting to satisfy the religious needs of certain citizens, a clearly impermissible objective under the First

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[187]*See* Warmflash, *supra* note 153, at 249.

[188]*See infra* notes 89-193 and accompanying text.

[189]*See* Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947).

[190]As announced in *Grand Rapids*, if governmental action promotes an impression that its powers and responsibilities are tied up "with those of any-or all-religious denominations," it risks conveyance of "a message of government endorsement . . . of religion," thereby violating a core purpose of the Establishment Clause. *Grand Rapids*, 473 U.S. at 389.

[191]As noted by the Court in *Board of Educ. of Kiryas Joel Villiage Sch. Dist. v. Grumet*, government may not favor one religion over others nor religious adherents collectively over nonadherents. *Grumet*, 114 S. Ct. at 2487. It is not an unreasonable perception of § 253 that the New York legislature is sending out a message that religious affiliation and religious fulfillment are of such vital importance that the government is willing to go to all costs to remedy religious barriers to remarriage via statutory enactment. This perception is buttressed by the fact that, as already discussed, civil dissolution of the marital partnership permits the couple to remarry secularly. It is tenable to conclude that the New York "community would think that the [New York legislature] was endorsing religion." *See* Lamb's Chapel v. Center Moriches School Dist., 113 S. Ct. at 2148; *see also* TRIBE, *supra* note 124, at 1187 ("Whether a given practice constitutes a forbidden establishment may ultimately depend on whether most people would view it as religiously significant.").

Amendment.[192] Furthermore the statute tends to lend aid to one subgroup

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[192]The Supreme Court has aptly noted that the government "simply could not operate if it were required to satisfy every citizen's religious needs and desires." *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 452 (1987). However, even were it theoretically possible for the government to simultaneously realize secular and sectarian objectives, the First Amendment operates as a complete barrier to government achievement of religious goals. Firstly, any "symbolic union of government and religion in one sectarian enterprise — is an impermissible effect under the Establishment Clause." *Grand Rapids*, 473 U.S. at 392. Many statutory challenges brought pursuant to the Establishment Clause have left the Supreme Court scrutinizing the effects of particular legislation for signs of government creation of what the Court has designated to be a "crucial symbolic link" between government and religion. *Id.* at 385; *Bowen*, 487 U.S. at 613 (citations omitted). As already explained, this statute tends to create that "crucial symbolic link." *See supra* notes 190-191 and accompanying text.

Secondly, as *Grumet* explicitly demonstrates, statutes like § 253, which specifically seek to alleviate the particular burdens of certain religious practice have been viewed as problematic under the First Amendment. *See Grumet*, 114 S. Ct. at 2483. First Amendment danger lies with statutes that tend to advance a "pervasively . . . religious mission." *See Bowen*, 487 U.S. at 610. In *Bowen*, the Court was confronted with an Establishment Clause challenge to a federal statute that provided financial grants to public or nonprofit private agencies or institutions in exchange for the rendering of services and participation in research in the area of premarital sexual relations and pregnancy. *Id.* at 593. Suit was brought against the government by a group of federal taxpayers, clergymen, and the American Jewish Congress based upon arguments that the legislation in question constituted government establishment of religion since the government was indiscriminately dispersing funds to institutes, some of who would attempt to counsel and teach according to the tenets of their specific faith. *Id.* at 597-600. Though the *Bowen* Court was primarily addressing the issue of financial aid to sectarian institutes, the observation of a First Amendment ban against government advancement of a religious mission is nonetheless applicable to statutes that render assistance of a non-financial kind. *See id.* at 610.

This does not mean that government must make efforts to thwart the fulfillment of religious goals for this would run afoul of the Free Exercise Clause. It is because of this concern that a line has been drawn to permit government accommodation of religion. It is constitutionally permissible for the government to take steps to minimize the impact that a particular action or legislation will have upon a religious group whose tenets will be affected by the action or law. *Gillette*, 401 U.S. at 453. In fact, accommodation is considered to be a duty of the government in the protection of Free Exercise values. *See Grumet*, 114 S. Ct. at 2492 ("[G]overnment may (and sometimes must) accommodate religious practices . . . ." (quoting Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 144-45 (1987)); *see also Lamb's Chapel*, 113 S. Ct. at 2151 ("[T]he Constitution 'affirmatively mandates accommodation, not merely tolerance, of all religions . . . . Anything less would require the "callous indifference" we have said was never intended.'") (Scalia, J., concurring) (citations omitted). In *Gillette*, the Court succinctly stated that "it is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with 'our happy tradition' of 'avoiding unnecessary clashes with the dictates of conscience.'" *Gillette*, 401 U.S. at 453; *see also Grumet*, 114 S. Ct. at

of a particular religion in its religious battles against another subgroup, again, an objective impermissible under the First Amendment.[193] Based

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2492 ("[W]e do not deny that the Constitution allows the state to accommodate religious needs by alleviating special burdens."); *see also id.* at 2501 (Kennedy, J., concurring) (referencing the widespread acceptance of the accommodation principle in the United States, noting that "[g]overnment policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage").

In line with the forementioned authority, the government has sought to avoid Free Exercise challenges via accommodation when possible. *See, e.g., Lyng*, 485 U.S. at 454 (noting the numerous steps taken by the government to minimize the impact of road construction upon Indian tribes who relied upon certain land for ceremonial purposes); *Gillette*, 401 U.S. at 441 (discussing § 6(j) of the Military Selective Service Act of 1967 which, in the interests of accommodation, exempted persons who, by reason of religious training and belief were "conscientiously opposed to participation in war in any form").

The principle of accommodation is not, however, without limits and the line between accommodation and establishment is crossed when individuals suggest elevation of their religious beliefs above secular purposes or attempt to impose their religious needs upon society in general. *See, e.g., Grumet*, 114 S. Ct. at 2492 (discussing the limits on accommodation, admonished attempts by religious adherents to adjust society to their "religiously grounded preferences" and, inferentially, religious needs). In *Grumet*, the Satmars, a religious group, explained that they "prefer to live together 'to facilitate individual religious observance and maintain social, cultural and religious values.'" *Id.* at 2492 n.9 (citation omitted). The Court concluded that New York legislation, declaring a village comprised exclusively of Satmar residents to be its own, independent, school district and bestowing it with the powers of such school districts, violated the First Amendment by transcending accommodation and effecting establishment. *Id.* at 2486-90.

Since the obtainment of a get can, undeniably, only be classified as a religious need, it appears that the Court's reproval in *Grumet* would apply and preclude a legislative attempt to facilitate a "religiously grounded preference." *Id.* at 2492; *see also* United States v. Lee, 455 U.S. 252, 260 (1982) (conveying that those limitations on conduct, voluntarily assumed by a religious adherent in furtherance of his commitment to the religion, "are not to be superimposed on . . . others" in the society). It is plausible to argue that Orthodox Jewish women are relying upon secular law to rescue them from tenets of their faith which, unfortunately, tend to severely circumscribe their religious liberty to remarry. As unfortunate as this is, however, it is improper for a state legislature to correct, modify or excise a religious tenet by drafting secular laws that secure religious liberty from the constraints of disliked "religiously grounded" restrictions.

[193]Though masked in neutral terms, § 253 was clearly envisioned as a weapon to be used by Orthodox Jewish women against husbands withholding a religious bill of divorce. *See* Sreter, *supra* note 27, at 714-16. Sreter accurately contends that "[w]hen [a] husband is truly interested in obtaining a civil divorce, [§ 253] is a boon to women enabling them to extract a get from their recalcitrant husband . . . . Those women whose religious convictions would not allow them to remarry without a get, are . . . at an advantage with section 253 *in their arsenal.*" *Id.* at 716 (emphasis added). In *Presbyterian Church*, the Supreme Court cautioned against secular legislation that "intrudes, for the benefit of one

upon the foregoing observations, it is a highly defensible position that section 253 has the principal or primary effect of endorsing or advancing religion[194] and only a secondary secular effect of facilitating some remarriages.

The final prong of the *Lemon* test requires that a statute not "foster an excessive government entanglement with religion."[195] As already mentioned, it was toleration of religion's intrusion into the political arena and of political power intruding into the realm of religion that eventuated in the societal hazards against which the Framers' intent to guard.[196]

While the entanglement prong of *Lemon*, as well as the entire three prong test, has come under severe criticism over the years,[197] those criticisms have been predominantly related to cases involving aid to parochial schools and the "catch-22" argument that the governmental supervision needed to ensure against "effects" violations often, itself, constitutes an "entanglement" violation.[198] While section 253 does not present the "catch-22" entanglement dilemma, it does present an immoderate risk of government intrusion on religion by virtue of the legislature's assumption of a veto power over the religious Orthodox tenet that confers complete discretion over the giving of a get upon the husband.[199]

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contrary to the principles of the First Amendment." *Presbyterian Church*, 393 U.S. at 448. Thus, the rule requiring government neutrality in matters of religion is no doubt violated by legislation, such as § 253, that lends state aid to one religious subgroup in order that it may more potently contest another subgroup.

[194]Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).

[195]*Id.* at 613 (citing Walz v. Tax Comm'n, 694 U.S. 664, 674 (1970)).

[196]*Id.* at 623.

[197]*See* Bowen v. Kendrick, 487 U.S. 589, 616 (1988) (citations omitted).

[198]*Bowen*, 487 U.S. at 615-16.

[199]Since it has been determined that the United States Constitution essentially "decrees that religion must be a private matter for the individual, the family, and the institutions of private choice," any attempt by the government to utilize its "pervasive modern . . . power" so as to "ultimately intrude on religion" conflicts with First Amendment edicts. *Id.* at 620, 625. With respect to the authority of the civil government to veto a determination of a religious body it has been stated that:

> "It is of the essence of . . . religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, *subject*

The New York "get statute" harbors an even more significant entanglement problem than the one aforementioned. In *Larkin v. Grendel's Den*,[200] the Supreme Court struck down a Massachusetts statute that would have been a completely legitimate exercise of governmental zoning power but for a provision that delegated a veto power over liquor licensing to private, nongovernmental entities, including churches.[201] The Court concluded that by its delegation of governmental power to religious institutions, the Massachusetts legislation "inescapably implicate[d]" the Establishment Clause.[202] The New York legislation in question suffers from this identical flaw in that it effectively bestows a veto power over a civil divorce decree upon a religious figure.[203] Similar to the Massachusetts' legislation struck

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only to such appeals as the organism itself provides for."

Presbyterian Church, 393 U.S. at 446 (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (1871)) (emphasis added). The *Watson* Court was merely expressing the well accepted proposition that the Constitution forbids the government from enmeshing itself in the process of determining ecclesiastical questions. For a detailed discussion on this prohibition, see *infra* note 136 and accompanying text. More important, perhaps, was the implication, contained in *Watson*, that the task of ameliorating exclusively religious predicaments properly belongs with the religious bodies themselves and not with the civil government. *See Presbyterian Church*, 393 U.S. at 446 (quoting *Watson*, 80 (13 Wall.) at 729).

[200]459 U.S. 116 (1982).

[201]*Id.* at 122, 125. The legislation in question provided, "Premises . . . located within a radius of five hundred feet of a church or school shall not be licensed for the sale of alcoholic beverages if the governing body of such church or school files written objection thereto." *Id.* at 117 (quoting MASS. GEN. LAWS ANN. ch. 138, § 16C (West 1974)). The Supreme Court seemed to concur with the Massachusetts Supreme Judicial Court's conclusion that the statute conferred a veto power upon churches and schools. *See Larkin*, 459 U.S. at 125.

[202]*Id.* at 123. The Court emphasized that legislation "vesting significant governmental authority in churches" enmeshes those churches in the exercise of governmental powers thereby frustrating the very objective underlying the Establishment Clause: "to . . . prevent, as far as possible, the intrusion of either [Church or State] into the precincts of the other." *Id.* at 126 (quoting Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)).

[203]The statute provides, in pertinent part, that:

> No final judgment of [civil] annulment or divorce shall be entered, notwithstanding the filing of the plaintiff's sworn statement prescribed by this section, if the clergyman or minister who has solemnized the marriage certifies, in a sworn statement, that he or she has solemnized the marriage

down in *Larkin*, the New York law fails to include or propose any method of foreclosing use of the delegated veto for the advancement of ideological purposes.[204] As a result of the grant of a veto power to rabbis, the New York legislation conveys an appearance of the joint exercise of governmental authority by Church and State which has been determined to violate the effects prong of *Lemon*.[205] For this reason, as well as the other forementioned problems implicated by section 253, the get law, as well as the judicial remedy of specific performance, will be hard pressed to survive Establishment Clause challenges.

C. FREE EXERCISE CONCERNS

A comprehensive analysis of New York's treatment of the problems generated by the Jewish get laws necessarily includes a review of New York case holdings and of section 253 from a Free Exercise perspective.[206]

> and that, to his or her knowledge, the plaintiff has failed to take all steps solely within his or her power to remove all barriers to the defendant's remarriage . . . .

N.Y. DOM. REL. LAW § 253(7) (McKinney 1994); *see also* Feldman, *supra* note 4, at 158. "The ability of a rabbi to block the divorce by filing an affidavit contesting a party's removal of barriers statement is a more troubling aspect of the statute." *Id.* After remarking upon the invalidation of the Massachusetts statute in Larkin, Feldman drew attention to the fact that "section 253 grants a rabbi veto power." *Id.*

[204]*Larkin*, 459 U.S. at 125. The Court expressed its disturbance with the fact that the government appellants had not "suggested any 'effective means of guaranteeing' that the delegated power '[would] be used exclusively for secular, neutral, and nonideological purposes.'" *Id.* (quoting Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 780 (1973)).

[205]"[T]he mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred. It does not strain our prior holdings to say that the statute can be seen as having a 'primary' and 'principal' effect of advancing religion." *Larkin*, 459 U.S. at 125-26. The Court later commented, "*Larkin* presented an example of united civic and religious authority, an establishment rarely found in such straightforward form in modern America . . . and a violation of 'the core rationale underlying the Establishment Clause.'" Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2488 (1994) (citations omitted).

[206]"[D]espite a general harmony of purpose between the two religious clauses of the First Amendment, the Free Exercise Clause no doubt has a reach of its own." Gillette v. United States, 401 U.S. 437, 461 (1971) (quoting Abington School District v. Schempp, 374 U.S. 203, 222-23 (1963)).

Generally speaking, the purpose of the Free Exercise Clause is to prevent the employment of governmental power to impede the observance of one or of all religions.[207] In terms of absolutes, it unequivocally extends protection to citizens against governmental restriction on what beliefs may be held[208] and firmly secures against interference with dissemination of religious ideas.[209] For obvious reasons, however, it is a general rule of Religion Clause jurisprudence that the religious views of citizens may and must be subordinated to some extent in the interests of pursuing public purposes.[210] This rule generally assumes priority when the government proffers a compelling governmental interest, attainment of which entails some inhibition of religious practice,[211] or when a particular religious practice so impinges upon a fundamental requirement of civilized society[212] that the government

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[207]*Id.* at 462.

[208]Sherbert v. Verner, 374 U.S. 398, 402 (1962) ("The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such . . . ." (citation omitted)).

[209]*See* Fowler v. Rhode Island, 345 U.S. 67, 69-70 (1953) ("[I]t is not within] the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings."); *see also Sherbert*, 374 U.S. at 402 (explaining that government may not use its taxing powers to constrain dissemination of particular religious viewpoints).

[210]*See Gillette*, 401 U.S. at 459; Reynolds v. United States, 98 U.S. 145, 163 (1878); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Braunfeld v. Brown, 366 U.S. 599, 603 (1961).

[211]Incidental burdens on the constitutional rights of free exercise "may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . . .'" *Sherbert*, 374 U.S. at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)). As acknowledged, the state interest requirement has been formulated in a variety of ways over the years. TRIBE, *supra* note 124, at 1242 n.1 (discussing Justice O'Connor's portrayal of the state's burden of persuasion standard as requiring a showing of an "unusually important" interest); *id.* at 1251-62 (explaining how the currently more lenient state interest standard evolved out of an originally more demanding test). Irrespective of the exact terms employed to describe the state's burden of persuasion with respect to its state interest, the Free Exercise Clause no doubt requires that the interest be a significant one.

[212]*See Reynolds*, 98 U.S. at 164 ("Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or *subversive of good order.*") (emphasis added). In *Reynolds*, the Court, in upholding a congressional statute that criminalized polygamy against a Free Exercise challenge, found that "from the earliest history of England [the practice of] polygamy ha[d] been treated as

asserts a right to override the First Amendment interests at stake.

The fact that Free Exercise prohibitions tend to be couched in terms of bans on laws designed to frustrate performance of religious practice[213] tends to inspire the question as to whether or not the withholding of a get, as opposed to the affirmative act of giving of a get, is religious practice or participation in a religious ritual.[214] The answer to this question is consequential since the government need only proffer a substantial governmental interest in favor of a law if that law actually infringes upon the free exercise of religion.[215] The question is answerable in the affirmative by analogy to prior case law. In *Sherbert v. Verner*,[216] for instance, the appellant complained that the state of South Carolina's unemployment compensation laws effectively forced her to perform the affirmative act of

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an offence against society." *Id.* at 164.

[213]In other words, bans against government created barriers to affirmative activities such as polygamy in *Reynolds*. *See Gillette*, 401 U.S. at 462.

[214]Again, it must be remembered that there are constitutional barriers to judicial inquiry into the sincerity of one's religious beliefs. *See Braunfeld*, 366 U.S. at 609. The question arises primarily because, since Orthodox Judaism does not affirmatively require the withholding of a get, it becomes difficult, if not impossible, to determine whether a man's refusal to deliver one is rooted in religious belief or a desire to harass his wife. *See* SHLOMO RISKIN, WOMEN AND JEWISH DIVORCE 135 (1989).

> In contemporary times . . . [o]ur freedom of social intercourse between Jewish and Gentile society, and the consequent assimilation and intermarriage, have reached staggering proportions. A vindictive husband, *or one who is unconcerned with the requirements of Jewish law*, can not only deny his wife a religious divorce if he so chooses, but can also-once he has obtained a secular divorce-remarry before a justice of the peace.

Id. (emphasis added). However, "the Court has made relatively few demands of people who claim religious motivations" to prove them. TRIBE, *supra* note 124, at 1243; *see also supra* note 163 and accompanying text.

[215]*See* Sherbert v. Verner, 374 U.S. 398, 403 (1962); *see also* Wisconsin v. Yoder, 406 U.S. 205, 214 (1971) (explaining that state compulsion of education in conflict with beliefs central to Amish lifestyle requires a finding that "the State does not deny . . . free exercise . . . or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause"); United States v. Lee, 455 U.S. at 252, 257 (1982) (illustrating, by implication, how the conclusion as to the existence of some conflict between religion and obligations imposed by the government is necessary to a Free Exercise inquiry).

[216]374 U.S. 398 (1962).

attending work, rather than remaining home, on her sabbath day of Saturday.[217] Similarly, a Jewish Orthodox husband will complain that the laws of New York force him to perform an affirmative act of delivering a get rather than utilizing his religiously derived discretion not to give it. In both cases, the result is government interference with an individual's ability to practice his religion as he believes. As such, the State of New York is, in fact, encroaching upon religious freedom and will be required, by precedent, to offer a compelling governmental interest to justify the infringement.[218]

Again, observation must be taken of the fact that there have been various state actions employed in the management of controversies arising in response to Jewish divorce law.[219] To reiterate, there has been judicial enforcement of promises to deliver a get, judicial refusal to enforce separation agreements coerced by threats to withhold a get and section 253 which is a preventative effort to thwart get disputes by eliminating the effect of the male's religious veto over the get in cases where a man is the plaintiff in a civil divorce action.[220]

The state will undoubtedly offer, as a compelling governmental interest in favor of judicial refusal to enforce separation agreements that are the product of threats to withhold a get, its interest in eliminating the potential for fraud, coercion and duress in marital dissolution agreements. Since the Court, through its opinions, has imparted the government with a right to regulate not only religiously motivated but, religiously required, actions

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[217]*Id.* at 401.

[218]*Sherbert*, 374 U.S. at 403. The *Sherbert* Court stated that "[i]t is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest of abuses, endangering paramount interests, give occasion for permissible limitation.'" *Id.* at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

And so, for example, in Prince v. Massachusetts, 321 U.S. 158 (1944), the Court upheld the criminal conviction of an aunt who had violated a Massachusetts' child labor law provision forbidding children of certain age groups to sell certain merchandise in a street or public place against the claimant's assertions that she had merely allowed the child to "exercis[e] her God-given right and her constitutional right to preach the gospel." *Id.* at 160-62. The Court noted that "the state has a wide range of power for limiting parental freedom and authority in things affecting [a] child's welfare; and . . . this includes, to some extent, matters of conscience and religious conviction." *Id.* at 167. The state's interest in *Prince* was based upon what the Court concluded to be the widely accepted premise that "[a] democratic society, rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *Id.* at 168.

[219]*See supra* notes 129-130 and accompanying text.

[220]*See supra* note 121 and accompanying text.

when they are found to violate important secular duties or to be "subversive of good order," it seems highly likely that the Court would accept, as a satisfactory governmental interest, the prevention of fraud, coercion and duress, all undeniably "subversive of good order."[221]

To the extent that this same interest is offered in support of section 253, it must necessarily fail within the scope of a Free Exercise challenge since the Court, even when it concedes the existence of a compelling state interest, conducts a review of whether there are alternatives means of achieving that same interest that pose less of a threat to First Amendment principles than the means selected by the state.[222] So far as the state's interest in preventing fraud, coercion and duress in separation agreements is concerned, there are neutral principles of law that effectively deal with that problem within a case by case framework.[223] Thus, section 253 is a superfluous means of combating the threat to that particular state interest.

The State will alternatively offer, as a secular purpose behind section 253, its interest in marriage and, hence, re-marriage. The institution of marriage, at least as described by the Supreme Court in *Reynolds v. United States*,[224] is capable of classification as "fundamental" to a civilized society. As such, there is a credible argument to be made that preservation of the ability to marry should be considered a compelling state interest. The governmental action undertaken in the *Avitzur* and *Koeppel* line of cases wherein the New York courts enforced husbands' promises to deliver a get may be similarly justified since such enforcement makes it more likely that Orthodox women will re-marry upon removal of the religious barrier.

In light of precedent, the Court's decision in *Reynolds*[225] arguably presents the most compelling argument in favor of upholding the constitutionality of both the "neutral principles" approach and of section 253.

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[221]*See* Braunfeld v. Brown, 366 U.S. 599, 603-04 (1961) ("[L]egislative power over mere opinion is forbidden but it may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion.").

[222]*See Braunfeld*, 366 U.S. at 607 (upholding Pennsylvania's Sunday closing laws as "valid despite indirect burdens on religious observance *unless the [s]tate may accomplish its purpose by means which do not impose such a burden*" (emphasis added)).

[223]*See supra* note 180 and accompanying text.

[224]The *Reynolds* Court, in referring to laws regulating the institution of marriage, described marriage as "[a] most important feature of social life." United States v. Reynolds, 98 U.S. 145, 165 (1878).

[225]98 U.S. 145 (1878).

This is a viable contention since the facts of *Reynolds* are similar to the facts presented by the get issue[226] and because of the Court's conclusion, in *Reynolds*, that it was within the legitimate scope of a state's police power to make an unqualified determination that plural marriages should not be allowed because of the "evil consequences" they produce.[227] This

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[226]In *Reynolds*, the accused was charged with violation of a Congressional statute criminalizing bigamy. *Reynolds*, 98 U.S. at 146. Perhaps the most significant factual similarity between *Reynolds* and the facts presented by get litigation is best emphasized by the trial court's conclusion, in *Reynolds*, that women were the "sufferers" of violations of the bigamy statute. *Id.* at 150. Women are likewise identified as the sufferers of the results of Jewish get law. See *supra* notes 34-44 and accompanying text.

Even the specific words chosen by the trial court in *Reynolds* ring of sentiments that parallel those regarding the plight of agunah. For example, the trial court, in charging the jury, explicated:

> "I think it not improper, in the discharge of your duties in this case, that you should consider what are to be the consequences to the innocent victims of this delusion. As this contest goes on, they multiply, and there are pure-minded women and there are innocent children,- innocent in a sense even beyond the degree of innocence of childhood itself. These are to be the sufferers; and as jurors fail to do their duty, and as these cases come up in the Territory, just so do these victims multiply and spread themselves over the land."

Reynolds, 98 U.S. at 150.

The second factual similarity between *Reynolds* and the get cases arises from the fact that it was a religious practice of male religious members which conflicted with the statute in *Reyolds* and which will conflict with the removal of the barriers requirement of § 253. *See id.* at 161 ("[I]t was an accepted doctrine of that church 'that is was the duty of male members of said church, circumstances permitting, to practise polygamy.'" (citation omitted)).

Thirdly, and perhaps most importantly, the practice of polygamy in *Reynolds* and the male control of religious divorce under Orthodox Judaism both implicate the state interest in marriage. *See id.* at 165 (explaining that in light of the marital institution's positive contributions to society, it is "usually regulated by [civil] law").

[227]*Reynolds*, 98 U.S. at 164-68. The Supreme Court specifically stated that:

> Polygamy has always been odius among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void (citations omitted), and from the earliest history of England polygamy has been treated as an offence against society. . . . Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in

conclusion was reached even despite the Court's awareness of the significance placed upon the practice of polygamy within the religion to which the accused ascribed.[228] An Orthodox Jewish husband's refusal to provide his wife with a bill of religious divorce likewise spawns "evil consequences."[229] Thus, relying upon *Reynolds* as precedent, there appears to be an educated argument in favor of both legislation and judicial activity that forecloses the potential for such consequences, even if such state action threatens to suppress some degree of religious practice.[230]

Further devaluation of any argument that section 253 of New York's domestic relations law is unconstitutional derives from the fact that the Court has previously sustained even highly extensive infringements of religion in

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> connection with monogamy . . . . An exceptional colony of polygamists under an exceptional leadership may sometimes exist for a time *without appearing to disturb the social condition* of the people who surround it; but there cannot be doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.

Id. at 164-66 (emphasis added).

[228]*Reynolds*, 98 U.S. at 161. The accused in *Reynolds* was a member of the Church of Jesus Christ of Latter-Day Saints, more commonly known as the Mormon Church. *Id.* The Court noted how, at trial, the appellant had proven that followers of his faith believed both that male church members were directly constrained to practice polygamy pursuant to divine revelation and that failure to so practice would be punished by "damnation in the life to come." *Id.*

[229]*See supra* notes 34-41 and accompanying text.

[230]This would, of course, necessarily rest upon New York's argument that its interest in supporting and encouraging re-marriages outweighs the First Amendment infringements perpetrated by *Avitzur* and *Koeppel* brand holdings, as well as enforcement of § 253. Such an argument is buttressed by the Court's prior assertions that the family unit is not beyond regulation so long as such regulation is in the public interest. Prince v. Massachusetts, 321 U.S. 158, 166 (1943). In accordance with this proposition, the *Reynolds* Court sensibly concluded that a judicial decision permitting elevation of a professed doctrine of religious belief above the organization of society within the "exclusive dominion of the United States" would be outlandish, particularly since such a holding is not compelled by the First Amendment. *Reynolds*, 98 U.S. at 166-67. The Court once again reiterated the well-known rule that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." *Id.* at 166.

the face of a countervailing public interest.[231] Moreover, the Court found the state interests in *Reynolds* to outweigh a practice that was, as demonstrated by competent evidence, not only central to the practice of religion,[232] but affirmatively required pursuant to a religious duty.[233] Dissimilarly, the husband's refusal to deliver a get is merely a choice against exercising his sole power to effect a religious divorce. It is not required that he withhold the bill of divorce and his doing so is, in fact, frowned upon by the religious community.[234] Thus the New York government's effective coercion of his delivery of a get cannot be regarded as precluding him from doing an act which his religion affirmatively requires.[235]

Still, while it is true that there is some constitutional support for section

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[231]As already stated, the governmental infringement upheld in *Reynolds* was one upon the practice of polygamy, a practice considered pivotal to the Mormon Church. This was also the case in *Lyng* wherein the Court acknowledged that the government action in issue would, if pursued, have "severe adverse effects" upon the respondents' ability to practice. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 442 (1987) (citation omitted). In fact, a study commissioned by the Forest Service yielded the conclusion that the government "constructing a road along any of the available routes 'would cause serious and irreparable damage to the sacred areas which are an *integral and necessary part* of the belief systems and lifeway of Northwest California Indian peoples.'" *Id.* (emphasis added) (citation omitted); *cf.* Wisconsin v. Yoder, 406 U.S. 205, 207, 218 (1971) (invalidating a compulsory school attendance law mandating attendance of public or private school until the age of sixteen as against members of the Amish community because such application "contravene[d] the basic religious tenets and practice of the Amish faith"). Though, as distinguishable from *Lyng* and *Reynolds*, the outcome in *Yoder* was favorable to the challengers of the statute, all three cases evidence that religious practices not considered "central" to the religion in issue are not likely to be the subject of a successful Free Exercise challenge.

[232]*See supra* note 231.

[233]*See supra* note 226 and accompanying text.

[234]*See supra* notes 52-64 and accompanying text.

[235]Thus, in terms of free exercise concerns, the New York government's actions cannot realistically be perceived as presenting the type of "objective danger" which underlies the Free Exercise Clause — a threat that, because of a particular governmental action or law, a religious group "must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region." *Yoder*, 406 U.S. at 218. Buttressing this is the Supreme Court's suggestion that the true goal of the Free Exercise Clause is to prevent government action from "doom[ing]" a practice of a particular religion altogether. *See, e.g.*, *Lyng*, 485 U.S. at 451. The Court intimated that it would be more likely to find a constitutional violation when government action "virtually destroy[s]" a group's "ability to practice their religion." *Id.* at 451-52 (citation omitted).

253, effective arguments can be presented that the marital interests likely to be offered to support the statute do not rise to the compelling level necessary to sustain a Free Exercise infringement. Firstly, while it is well-established that the family institution is not shielded against regulation by the state,[236] it has been explicitly recognized that the government's power over adults is less extensive than its power to control conduct of, or that affects, children.[237] Since a woman's inability to obtain a get does not affect her already existing children,[238] the state cannot rely upon child protection as a compelling governmental interest. Secondly, proper regard must be given to the fact that agunah, though religiously barred from re-marriage, are nonetheless secularly authorized to re-marry.[239]

Thirdly, the question must be realistically posed as to whether the problem presented by the get laws is reasonably analogous to the grave ills which the Supreme Court believed to flow from the practice of polygamy in *Reynolds*.[240] In light of these concerns and distinctions, *Reynolds* may not be as favorable to the New York government as a desultory review of the case might suggest.

V. CONCLUSION

There is no doubt that the Orthodox Jewish get laws are a source of grief and distress for female adherents. Furthermore, it is not disputed that Jewish divorce laws do have the practical effect of discouraging many Orthodox Jewish women from remarrying as well as from bearing any children which might suffer the status of mamzer.[241] Still, failure to obtain a Jewish divorce presents absolutely no impediment to secular divorce and, ergo, secular remarriage.[242] The courts of New York have outwardly

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[236]Prince v. Massachusetts, 321 U.S. 158, 166 (1943).

[237]*Id.* at 168 ("The state's authority over children's activities is broader than over like actions of adults."); *see also id.* at 166-70.

[238]*See supra* notes 39-41 and accompanying text.

[239]*See supra* note 38 and accompanying text.

[240]The Court in *Reynolds* specifically commented upon the negativity with which polygamy was historically associated. *Reynolds*, 98 U.S. 145, 164-65 (1878).

[241]*See* Moskowitz, *supra* note 18, at 304.

[242]*See* Redman, *supra* note 23, at 390.

recognized the independence of these religious constraints from secular divorce law, which poses no comparable barrier to remarriage.[243]

As the New York Supreme Court in *Avitzur* correctly noted, the "sole purpose" behind Mrs. Avitzur's request for secular court enforcement of her husband's promise to appear before the religious tribunal was a desire to obtain a religious divorce so that she could remarry in accordance with her religious tenets.[244] Although many would argue that aiding her to do so would be a noble aim for any secular court or legislature, the United States Constitution forbids it. No matter how admirable its reasons for doing so, New York is not constitutionally permitted to excise a tenet, that it finds to be disagreeable, from a particular religion if doing so would effect an establishment of religion in this country.

While the state of New York may have facially sound legal arguments with which to fight a Free Exercise challenge, its laws, both judicial and legislative, are less defensible from an Establishment Clause perspective. Section 253 is the epitome of the aid to religion[245] that our Framers determined to preclude so as to effect a separation of church and state. More importantly, the separation of church and state is not an end in and of itself, but rather, a means to an end which our Framers, based upon past experience, considered vital to the establishment and survival of a strong nation state.[246]

In the title of her article regarding Jewish divorce law and secular government attempts to alleviate its harsh results, Barbara Redman poses the question as to what secular courts can do to "aid the Jewish woman"? In light of this nation's views on the importance of religious freedom, as well as the corresponding significance placed upon avoiding an Establishment of religion, the answer, regrettably, is "nothing."

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[243]Avitzur v. Avitzur, 449 N.Y.S.2d 83, 84 (N.Y. App. Div. 1982) (expressing that the state's interest in the parties' marital status was concluded upon the granting of a civil divorce).

[244]*Id.*

[245]*See supra* notes 84-195 and accompanying text (discussing the "aid to religion" concept as enunciated in Establishment Clause jurisprudence).

[246]*See supra* note 124 and accompanying text.