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Religious Documents and the Establishment Clause

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In times past, many—perhaps most—wars had their origin in religious controversies. If today such [religions] as Arianism, Manichaeanism, Monophysitism, and Iconoclasm no longer rend empires, religious schismaticism remains prevalent, and religious disputes, unique in the passions and ideological furors they generate, offer a fertile source of civil conflict.[1]

I. INTRODUCTION

A priest, a rabbi, and an imam walk into a contract lawyer's office. Fortunately, this is not the opening of a lawyer joke, but it might well be the prelude to a complicated constitutional question about the interaction of the First Amendment and contract law. Pastors, priests, rabbis, imams, religious schools, churches, religious businesses, and a wealth of faith-based groups all enter into contractual agreements. Not surprisingly, these agreements often contain religious language, and sometimes they even hinge on provisions invoking expressly religious concepts.[2] Religious documents come in a variety of forms, including marriage contracts,[3] disposition of property documents,[4] agreements on a child's reli-

1. Note, *Judicial Intervention in Disputes over the Use of Church Property*, 75 HARV. L. REV. 1142, 1142 (1962) (footnote omitted).

2. *See* Prescott v. Northlake Christian Sch., 141 F. App'x 263, 274 (5th Cir. 2005) (noting that "[t]he parties thus evinced a clear desire to incorporate biblical provisions into their everyday employment dealings"); Michael C. Grossman, Note, *Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process*, 107 COLUM. L. REV. 169, 188–89 (2007) (noting that some religious arbitration agreements are "governed by religious law, can contain terms subject to dispute among religious authorities, and can also include statements of faith" (footnotes omitted)).

3. *E.g.*, Avitzur v. Avitzur, 446 N.E.2d 136 (N.Y. 1983) (addressing a Jewish marriage contract).

4. *E.g.*, First Presbyterian Church of Schenectady v. United Presbyterian Church, 464 N.E.2d 454 (N.Y. 1984) (addressing a church property dispute).

gious upbringing,[5] commercial transactions,[6] employment contracts,[7] and arbitration agreements.[8] In some states, these agreements have even been the subject of legislation.[9] In sum, religious

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5. *E.g.*, Zummo v. Zummo, 574 A.2d 1130 (Pa. Super. Ct. 1990) (plurality) (addressing an oral agreement to raise the children in the Jewish faith in the context of an order forbidding the father taking the children to non-Jewish religious services); Rebecca Korzec, *A Tale of Two Religions: A Contractual Approach to Religion as a Factor in Child Custody and Visitation Disputes*, 25 NEW ENG. L. REV. 1121 (1991).

6. *E.g.*, Nat'l Grp. for Commc'ns & Computers Ltd. v. Lucent Techs. Int'l Inc., 331 F. Supp. 2d 290 (D.N.J. 2004) (addressing a choice of law provision that set Saudi Arabia's divine law as applicable); Menorah Chapels at Millburn v. Needle, 899 A.2d 316 (N.J. Super. Ct. App. Div. 2006) (contract for a funeral and specific Jewish rituals); Rende & Esposito Consultants, Inc. v. St. Augustine's Roman Catholic Church, 516 N.Y.S.2d 959 (N.Y. App. Div. 1987) (addressing a church property and commercial contract dispute).

7. *E.g.*, Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648 (10th Cir. 2002) (addressing church employment and sexual harassment case); Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991) (addressing a termination under an employment contract requiring adherence to religious laws); Basinger v. Pilarczyk, 707 N.E.2d 1149 (Ohio Ct. App. 1997) (addressing a breach of contract claim brought by former school teachers).

8. *E.g.*, Prescott v. Northlake Christian Sch., 141 F. App'x 263 (5th Cir. 2005); Encore Prods., Inc. v. Promise Keepers, 53 F. Supp. 2d 1101 (D. Colo. 1999) (addressing a commercial arbitration agreement requiring a type of arbitration called Christian Conciliation); Sieger v. Sieger, 747 N.Y.S.2d 102 (N.Y. App. Div. 2002) (addressing the claim that an agreement to resolve disputes using regulations arising from thirteenth century synods was an agreement to arbitrate disputes before a Jewish *beth din*); *cf.* Miller v. Miller, 620 A.2d 1161, 1168 (Pa. Super. Ct. 1993) (Johnson, J., dissenting) (quoting a case not raising Establishment Clause issues but rather a Christian Conciliation agreement addressing marital dissolution, child custody, and arbitration, among other matters).

9. *See* N.Y. DOM. REL. LAW §§ 236(B)(5)(h), 236(B(6)(d) (McKinney 2010) (instructing a court to, when appropriate, consider any "barrier to remarriage," including religious barriers, in equitable distribution proceedings); N.Y. DOM. REL. LAW § 253(2) (McKinney 2010) (requiring parties to allege when seeking dissolution of a marriage that he or she has or will take "all steps solely within his or her power to remove any barrier to the defendant's remarriage"). These statutes respond to problems that arise under Jewish law in particular divorce situations. This general issue is discussed further in this Article, but the statutes themselves are beyond its scope.

For discussion of these statutes see Ilene H. Barshay, *The Implications of the Constitution's Religion Clauses on New York Family Law*, 40 HOW.

parties sometimes draft religious documents, and they do so in a variety of contexts. The infusion of potentially sacred obligations into the realm of secular contract law presents courts with a number of difficult questions.

For example, although courts are charged to interpret and give effect to religious documents whenever possible,[10] the judiciary is starkly constrained by the religion clauses of the First Amendment, especially the Establishment Clause.[11] The conflicting commands to enforce contracts and yet to uphold the limitations of the Establishment Clause are not easily reconciled. What is a court to do when an agreement specifies that "the law of Moses and Israel" governs,[12] states that disputes are to be referred to a

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L.J. 205, 230–35 (1996) (arguing that these statutes are likely unconstitutional); Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781, 822–36 (1998) (concluding that "statutes designed to induce husbands to go through Jewish divorces do present serious constitutional issues, but the basic features of those statutes should be accepted"); Lawrence M. Warmflash, *The New York Approach to Enforcing Religious Marriage Contracts: From* Avitzur *to the* Get *Statute*, 50 BROOK. L. REV. 229, 250–53 (1984) (arguing that section 253 of the New York Domestic Relations Law is unconstitutional); Jill Wexler, Note, *Gotta Get a* Get*: Maryland and Florida Should Adopt* Get *Statutes*, 17 J.L. & POL'Y 735 (2009) (discussing these statutes and similar ones proposed in other states).

10. *See, e.g.*, Watson v. Jones, 80 U.S. 679, 714 (1871) ("Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints."). In addition to this command by the Supreme Court, the parties charge courts with assisting them as well. *See, e.g.*, Ira Mark Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CALIF. L. REV. 1378, 1382 (1981) ("Internal religious disputes . . . unlike other religion cases, do not involve a meddlesome government gratuitously inserting itself into church affairs. They are requests by one faction of the church—sometimes by both factions—that the court act as referee." (footnote omitted)).

11. *See* discussion *infra* Part III.

12. *Compare In re* Marriage of Goldman, 554 N.E.2d 1016, 1018 (Ill. App. Ct. 1990) (upholding the enforcement of a Jewish marriage contract that provided that the "law of Moses and Israel" governed the marriage), *with* Aflalo v. Aflalo, 685 A.2d 523 (N.J. Super. Ct. Ch. Div. 1996) (declining to enforce a Jewish marriage contract as violative of the First Amendment).

"Christian Conciliation Service" for resolution,[13] or requires a husband to pay a dowry arising from obligations set out in the Qur'an?[14] How does a court interpret or enforce contractual terms that invoke religious matters?

This Article takes direct aim at these questions by explaining the relevant Establishment Clause limitations, analyzing the governing case law from around the nation, and outlining a proposed model for judicial analysis of all religious documents. It also reviews a wide variety of guidance helpfully offered by other commentators in these areas. Part II sets the stage by highlighting some of the cultural and religious factors that often surround religious documents, taking as an example marriage contracts. Part III illuminates the fact that it will at times be impossible, from a constitutional standpoint, to enforce religious agreements under governing case law. Part IV then discusses state and federal court decisions that have addressed religious documents. Next, Part V draws from existing literature from other commentators on interpreting religious agreements and begins to frame an analytical model. Finally, Part VI proposes a model for courts to follow in adjudicating religious document cases.

From the outset, it is clear that there is no easy answer to the problems that religious documents can present. When faced with a religious controversy, courts can allow some inquiry into religious matters, or alternatively, they can foreclose inquiry completely. Despite the constitutional concerns that potentially arise, this Article argues strongly against the latter option. The Establishment Clause permits limited inquiries into religious practices,

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13. *See, e.g.*, Glenn G. Waddell & Judith M. Keegan, *Christian Conciliation: An Alternative to "Ordinary" ADR*, 29 CUMB. L. REV. 583 (1999) (discussing and citing cases involving a dispute resolution format called "Christian Conciliation"). "Christian Conciliation" may be defined as "'a process for reconciling people and resolving disputes out of court in a biblical manner.'" *Id.* at 590 (quoting INST. FOR CHRISTIAN CONCILIATION, GUIDELINES FOR CHRISTIAN CONCILIATION 1 (rev. 3.8 1989)); *see also* Prescott v. Northlake Christian Sch., 141 F. App'x 263, 274 (5th Cir. 2005) (discussing employment contract requiring all differences to be resolved according to biblical principles).

14. *Compare* Aziz v. Aziz, 488 N.Y.S.2d 123 (N.Y. Sup. Ct. 1985) (upholding an Islamic marriage contract requiring payment of a *mahr*), *with* Habibi-Fahnrich v. Fahnrich, No. 46186/93, 1995 WL 507388 (N.Y. Sup. Ct. July 10, 1995) (declining to uphold Islamic marriage contract requiring payment of a *mahr* because it failed to satisfy the requirements of the statute of frauds).

and thus, courts should not broadly dismiss oversight of religious document cases. Rather, by following the model proposed herein, courts can attempt to honor the expectations of the contracting parties within the limits established by the Constitution. Moreover, while much of the analysis and discussion in this Article focuses specifically on religious contracts under the Establishment Clause, the model proposed in this Article is aimed at addressing any type of document containing religious terms.

II. THE PARTIES: RELIGIOUS AND CULTURAL FACTORS SURROUNDING ISLAMIC AND JEWISH MARRIAGE CONTRACTS

As already suggested, interpreting documents containing religious language raises a variety of difficult constitutional questions. Courts and commentators alike have struggled to answer these questions, and no uniform answers have yet emerged. Part of the complexity sometimes stems from cultural and religious expectations surrounding the agreement at issue, and the extent to which the agreement can be interpreted and enforced is often related to those atmospheric details.[15] Accordingly, this Part provides an example of such details and examines common religious and cultural factors surrounding marriage contracts—a category of religious documents that has repeatedly found its way into secular courts.[16]

Because Islam and Judaism regard marriage as a contractual arrangement, both religions have a strong history of marriage

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15. Many courts and commentators have observed that unfortunate consequences sometimes relate to non-enforcement of religious marriage contracts. *See* Barshay, *supra* note 9, at 213–15; Irving Breitowitz, *The Plight of the* Agunah*: A Study in* Halacha*, Contract, and the First Amendment*, 51 MD. L. REV. 312 (1992); Warmflash, *supra* note 9, at 250–53; Lindsey E. Blenkhorn, Note, *Islamic Marriage Contracts in American Courts: Interpreting* Mahr *Agreements as Prenuptials and Their Effect on Muslim Women*, 76 S. CAL. L. REV. 189 (2002); Tracie Rogalin Siddiqui, *Interpretation of Islamic Marriage Contracts by American Courts*, 41 FAM. L.Q. 639 (2007); Wexler, *supra* note 9.

16. The scholarly discussion surrounding Jewish and Islamic marriage contracts has been quite extensive. *See generally* Barshay, *supra* note 9, at 213–15; Breitowitz, *supra* note 15; Blenkhorn, *supra* note 15, at 192–202; Siddiqui, *supra* note 15.

contracts.[17] In Judaism, when couples marry, they often agree to a document called a *ketubah*, which typically contains a number of various promises.[18] Similarly, marrying Muslim couples often sign a religious document called a *nikah*, which itself evidences an assortment of terms and promises.[19] These documents—a *ketubah* and a *nikah*—can resemble secular contracts in many respects, and the language of a traditional *ketubah* or *nikah* often contains promises that resemble contractual exchanges. For example, a traditional *nikah* contains a *mahr*, a promise by the husband to pay a certain amount to a wife upon marriage and to pay an additional amount upon divorce if the divorce occurs for specified reasons.[20] Similarly, a *ketubah* might provide that a husband and wife will abide by "the law of Moses and Israel" during the marriage.[21] This promise to adhere to the law of Moses and Israel can have specific meaning for some Jewish couples, including how a divorce is to be handled.[22]

A *ketubah* could also contain an agreement to appear before a *beth din* in the event of any disputes.[23] A *beth din* is "a rabbinical tribunal commonly comprised of three rabbis, or one rabbi and two lay persons, assembled to decide matters of Jewish law or

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17. Michelle Greenberg-Kobrin, *Civil Enforceability of Religious Prenuptial Agreements*, 32 COLUM. J.L. & SOC. PROBS. 359, 361 (1999) (citing BABYLONIAN TALMUD, *Kiddushin* at 2a); Emily L. Thompson & F. Soniya Yunus, Note, *Choice of Laws or Choice of Culture: How Western Nations Treat the Islamic Marriage Contract in Domestic Courts*, 25 WIS. INT'L L.J. 361, 363 (2007) (citing ALAMGIR MUHAMMAD SERAJUDDIN, SHARI'A LAW AND SOCIETY: TRADITION AND CHANGE IN SOUTH ASIA 195 (2001)).

18. 2 ENCYCLOPEDIA JUDAICA 432 (1st ed. 1971); 11 ENCYCLOPEDIA JUDAICA 840 (1st ed. 1971); *see generally* Jennifer A. Hardin, Note, *Religious Postmarital Dispute Resolution: Jewish Marriage Contracts and Civil Courts*, 4 OHIO. ST. J. ON DISP. RESOL. 97, 97–101 (1988) (discussing Jewish marriage contracts).

19. *See, e.g.*, Siddiqui, *supra* note 15, at 642.

20. *Id.* at 642–45.

21. *See In re* Marriage of Goldman, 554 N.E.2d 1016, 1018 (Ill. App. Ct. 1990) (addressing a *ketubah* involving this language); Avitzur v. Avitzur, 446 N.E.2d 136, 140 (N.Y. 1983).

22. *See, e.g.*, *In re Marriage of Goldman*, 554 N.E.2d at 1018–19 (discussing a Jewish wife's alleged expectations under a *ketubah*).

23. *See Avitzur*, 446 N.E.2d at 137 (considering a *ketubah* containing a provision recognizing a *beth din*); Greenawalt, *supra* note 9, at 816 (discussing a draft version of a *ketubah* containing such a provision).

resolve disputes."[24] Thus, an agreement in a *ketubah* to appear before a *beth din* could be regarded as an arbitration clause. All of these provisions—a *mahr* provision, the promise in a *ketubah* to follow the law of Moses and Israel, and any provisions recognizing a *beth din*—could have relevance if the parties seek a divorce.

A divorce in both Islam and Judaism invokes specific and important religious consequences. In Judaism, for instance, the marriage is not regarded as dissolved religiously even after a civil divorce by a secular court.[25] The marriage continues to exist under Jewish law until the husband gives and the wife accepts a religious divorce called a *get*.[26] Until then, any future romantic relationships that the ex-husband and ex-wife engage in are considered extra-marital.[27] For the ex-wife without a *get*, this result is particularly problematic. If the ex-husband engages in future romantic relationships, he will be considered to have engaged in polygamy,[28] but if the ex-wife becomes romantically involved again, she will be considered to have engaged in adultery.[29] In fact, because the ex-wife has not been given a *get*, she is deemed an *agunah* ("chained woman")[30] and may not marry again in the eyes of her religion.[31] If she does marry again, any children born of that marriage will be considered *mamzerim*, to have been born from an "incestuous or adulterous relationship," and they will be prohibited from marrying Jews other than fellow *mamzerim*.[32] Thus, the consequences for a wife whose husband will not give her a *get* are substantial, long-lasting, and generally more burdensome than the consequences for the husband. In Islam, the consequences of divorce can be similar-

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24. Breitowitz, *supra* note 15, at 326.

25. *See* Greenberg-Kobrin, *supra* note 17, at 361 (citing IRVING BREITOWITZ, BETWEEN CIVIL AND RELIGIOUS LAW: THE PLIGHT OF THE AGUNAH IN AMERICAN SOCIETY 5–6 (1993)).

26. *Id.*

27. Greenawalt, *supra* note 9, at 810–11.

28. *Id.* at 811.

29. *Id.*

30. *See id.* at 811; Greenberg-Kobrin, *supra* note 17, at 370.

31. *See* Greenawalt, *supra* note 9, at 811; Greenberg-Kobrin, *supra* note 17, at 370. Of course, there are branches of Judaism that would not limit an *agunah* in this way.

32. *See* J. David Bleich, *Jewish Divorce: Judicial Misconceptions and Possible Means of Civil Enforcement*, 16 CONN. L. REV. 201, 231 & n.95 (1984); Greenawalt, *supra* note 9, at 811; Hardin, *supra* note 18, at 99.

ly significant. For example, depending on the circumstances of the dissolution, the *mahr* could be triggered.[33] A *mahr* can be very important to a Muslim wife, especially if she looked to the *mahr* as a safety net in the event of dissolution.

To address these important religious consequences, parties sometimes include them in their marriage contract. In Judaism, there are certain divorce circumstances that require a Jewish husband to give his wife a *get*, just as there are certain circumstances in Islam that require a husband's payment of a *mahr*.[34] A provision in a couple's marriage contract stating that Jewish or Islamic law governs could be alleged to be a contractual promise invoking those religious norms. Those norms could direct, for example, the husband to do as his respective religion requires—to give his wife a *get* or to pay a *mahr*. In a contentious divorce, such a contractual term could easily find its way into a secular court.[35] Indeed, divorces involving religious agreements are not rare.[36] Although estimates vary from source to source, some commentators have suggested that there are thousands of *agunah* women in New York State alone.[37] The problem grew to such significance that New

33. *See* Blenkhorn, *supra* note 15, at 192 n.15 ("There are four main legal schools or sects within Islam: the Hanafi, Maliki, Shafi'i, and Hanbali. It should be stressed that there are many variations within the four schools as to interpretations and implementation of the Qur'an, and thus, it is difficult to generalize across many regions, tribes, and countries."); *see also* Siddiqui, *supra* note 15, at 645.

34. *See* Minkin v. Minkin, 434 A.2d 665, 667–68 (N.J. Super. Ct. Ch. Div. 1981) (addressing a wife's claim that her husband was required to give her a *get* under their *ketubah*); Blenkhorn, *supra* note 15, at 192; Siddiqui, *supra* note 15, at 645.

35. *See Minkin*, 434 A.2d at 667–68; Aziz v. Aziz, 488 N.Y.S.2d 123 (N.Y. Sup. Ct. 1985) (requiring payment of a *mahr*).

36. *See* Blenkhorn, *supra* note 15, at 189–90, 192–202; Alan C. Lazerow, Comment, *Give and "*Get*"? Applying the Restatement of Contracts to Determine the Enforceability of "*Get *Settlement" Contracts*, 39 U. BALT. L. REV. 103 (2009); Wexler, *supra* note 9, at 740–49; *see also infra* Part IV (discussing religious contract cases).

37. Greenawalt, *supra* note 9, at 812 (citing IRVING BREITOWITZ, BETWEEN CIVIL AND RELIGIOUS LAW: THE PLIGHT OF THE AGUNAH IN AMERICAN SOCIETY 2 & n.4 (1993)) (pointing to one study that found "15,000 Orthodox and Conservative Jewish women are *agunot* in New York State"); *see also* Breitowitz, *supra* note 15, at 316 n.6 (noting estimates varying between 50 and 150,000 in New York State).

York adopted statutes specifically designed to assist women trapped in *agunah* status.[38]

Hence, while religious marriage agreements both address and stem from religious matters, they are at their core simply agreements entered into by two people in which they make promises. The question that the Establishment Clause poses to such agreements is: if a *ketubah* or *nikah* is valid under contract principles, is it nevertheless unenforceable because of its religious content and purpose? Other religious documents, such as commercial contracts between religious parties, present the same sort of question: even though the document reflects exchanged expectations, does the fact that it also has religious implications or contains religious terms render it impossible to interpret and enforce without exceeding the Establishment Clause's limitations? It is these questions that Part III addresses.

III. THE SUPREME COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE

Although the Supreme Court has never comprehensively addressed the framework for analysis of religious contracts under the Establishment Clause, it has decided several cases that suggest the analysis a court should use. While some cases are complex, portions of the Court's jurisprudence are firmly settled. In fact, some of the clearest dictates of the Court emanate from a relatively straightforward line of cases espousing a "prohibition on coercion."

A. Coercion

The rule against coercion is especially significant, for it directly affects analysis of a religious document under the Establishment Clause. In two fairly recent cases, the Supreme Court identified a prohibition against coercion grounded in the Estab-

38. *See* N.Y. DOM. REL. LAW §§ 236(B)(5)(h), 236(B(6)(d) (McKinney 2010) (instructing a court to, when appropriate, consider any "barrier to remarriage," including religious barriers, in equitable distribution proceedings); N.Y. DOM. REL. LAW § 253(2) (McKinney 2010) (requiring parties to allege when seeking dissolution of a marriage that he or she has or will take "all steps solely within his or her power to remove any barrier to the defendant's remarriage"). For additional discussion of these statutes, see sources cited *supra* note 9.

lishment Clause. In *Lee v. Weisman*, a rabbi was invited by a school principal to give a nonsectarian invocation and benediction at a middle school graduation.[39] The Court held that, especially for the school children in attendance, the invocation and benediction amounted to coerced participation in a religious exercise and therefore a violation of the Establishment Clause.[40] The Court explained:

> It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so." The State's involvement in the school prayers challenged today violates these central principles.[41]

The Court reiterated the Establishment Clause prohibition against coercion in a subsequent case, *Santa Fe Independent School District v. Doe*.[42] *Santa Fe* involved students saying a prayer over a public address system before high school football games.[43] Looking to its analysis in *Lee*, the Court held that "the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship"[44] and stated that "the government may no more use social pressure to enforce orthodoxy than it may use more direct means."[45]

Together, *Santa Fe* and *Lee* stand for the proposition that coercing participation in a religious exercise is a violation of the Establishment Clause. There is no indication that this prohibition

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39. Lee v. Weisman, 505 U.S. 577, 581–82 (1992).

40. *Id.* at 598 ("[T]he conformity required of the student in this case was too high an exaction to withstand . . . the Establishment Clause. The prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise . . . .").

41. *Id.* at 587 (citations omitted).

42. 530 U.S. 290 (2000).

43. *Id.* at 294.

44. *Id.* at 312.

45. *Id.* (quoting *Lee*, 505 U.S. at 594) (internal quotation marks omitted).

on religious coercion stemming from school prayer cases is inapplicable to other types of cases. Accordingly, this prohibition will come directly into play when enforcing religious agreements in which the parties contract for the performance of a religious exercise.[46] As is discussed in Parts IV, V, and VI, secular courts should consider such promises unenforceable. Unfortunately, however, the rest of the inquiry under the Establishment Clause is not nearly as direct as the prohibition described in *Santa Fe* and *Lee*.

B. Jones *et al.*: *Church Property Cases as Religious Document Cases*

While more tenuous than *Santa Fe* and *Lee*, most of the guiding law for analyzing religious contracts stems from a line of Supreme Court cases involving church property disputes, the best known of which is *Jones v. Wolf*.[47] Although focused on addressing the property disputes at issue, this line of cases also involved an analysis of religious documents. In *Jones*, for example, a Georgia church split into two factions.[48] One faction argued that the church should break away from its affiliation with the hierarchical Presbyterian Church in the United States ("PCUS"), and the other faction, in the minority, argued that the church should not disaffiliate.[49] Notwithstanding the pleas of the minority, the local church broke away from the hierarchical PCUS by a vote of 164 to 94.[50] In response, an investigatory commission within the hierarchical church issued a written ruling declaring that the minority faction

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46. Or, alternatively, the prohibition will apply in the event that enforcing arbitration results in requiring performance of a religious act. *See, e.g.*, Waddell & Keegan, *supra* note 13, at 593 ("[A] significant distinction between ordinary ADR and [Christian] conciliation is the authority of the conciliator/arbitrator to 'grant any remedy or relief that they deem scriptural, just and equitable, and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract'" (quoting Judith M. Keegan, *The Peacemakers: Biblical Conflict Resolution and Reconciliation as a Model Alternative to Litigation*, 1987 MO. J. DISP. RESOL. 11, 16 (1987) (citing Rule 40B of the Rules of Procedure for Christian Conciliation))).

47. 443 U.S. 595 (1979).

48. *Id.* at 598.

49. *Id.*

50. *Id.* at 598, 607.

was "the true congregation" of the local church.[51] Rather than appealing to a higher church court within the PCUS, the majority faction sought relief in state and federal courts.[52]

When the case reached the Supreme Court, the Justices stated strongly that although the case involved a dispute between religious parties and involved interpretation of religious documents—the deed to the church and other documents specifying ownership and control—it was nevertheless an appropriate matter for secular courts to resolve. The Court remarked:

> There can be little doubt about the general authority of civil courts to resolve this question. The State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively.[53]

Although the Court noted that "the First Amendment severely circumscribes the role that civil courts may play in resolving" such disputes, it nevertheless rejected the argument that states were required to adopt a broad deference to religious tribunals as a matter of adjudicating church property disputes.[54] Instead, the Court held that states were entitled to adopt a "neutral principles of law" approach to resolve such disagreements.[55]

Under the neutral principles of law approach, a court uses normal legal principles to resolve the dispute between the religious parties. For example, if a case involves a religious property dispute, the court applies traditional property law axioms. In doing so, the neutral principles approach authorizes courts to examine

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51. *Id.* at 598 (internal quotation marks omitted).

52. *Id.*

53. *Id.* at 602; *see also* Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969) ("Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property.").

54. *Jones*, 443 U.S. at 602 (quoting *Mary Elizabeth Blue Hull Mem'l Church*, 393 U.S. at 449) (internal quotation marks omitted).

55. *Id.* at 603 (citing Md. & Va. Churches v. Sharpsburg Church, 396 U.S. 367, 368 (1970); *Mary Elizabeth Blue Hull Mem'l Church*, 393 U.S. at 449).

documents containing religious terms and to interpret them "in purely secular terms, and not to rely on religious precepts" in determining their meaning.[56] To resolve the property dispute in *Jones*, the neutral principles of law analysis required the Court to focus on "the language of the deeds, the terms of the local church charters, the state statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property."[57] In sum, the Court applied traditional legal principles just as it would in any other case.

In describing the primary advantages of the neutral principles of law analysis, the Supreme Court noted that it is "completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity."[58] Additionally, because the analysis "relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges[,]" courts are free "from entanglement in questions of religious doctrine, polity, and practice."[59] Moreover, use of neutral principles "shares the peculiar genius of private-law systems in general-flexibility in ordering private rights and obligations to reflect the intentions of the parties [through the use of] reversionary clauses and trust provisions."[60]

The *Jones* neutral principles approach can be applied directly to interpretation of religious documents other than charters, deeds, and constitutions. Indeed, it can be used for any religious document, and accordingly, *Jones* provides a standard that courts should adopt to resolve disputes involving religious contracts.[61] Despite its flexibility,[62] however, limitations to the *Jones* standard

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56. *Id.* at 604; *see also id.* ("[T]here may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property.").

57. *Id.* at 602–03 (adopting the approach utilized by the Court in *Md. & Va. Churches*).

58. *Id.* at 603.

59. *Id.*

60. *Id.*

61. As discussed *infra* in Part IV, neutral principles is a standard some courts have in fact adopted to interpret religious contracts—as have some commentators, see *infra* Part V.

62. *See supra* notes 59–60 and accompanying text.

do exist. In interpreting the language of a document, for instance, the court must "scrutinize the document in purely secular terms" and not rely on "religious precepts" in that interpretation.[63] The court would then apply "objective, well-established concepts" of law to resolve the dispute which, in the case of religious agreements, would generally be concepts of contract law.[64] In this way, the standard itself is remarkably straightforward. A court simply does what it would do normally, almost as if the parties and documents involved were not religious. The court should read the documents in secular terms and adjudicate the case on that basis.

However, because the parties involved are in fact religious, the Establishment Clause places additional restrictions on adjudication of the dispute beyond *Jones*. *Serbian Eastern Orthodox Diocese v. Milivojevich* and *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Church* also provide important principles.[65] Both cases provide baseline limitations on a court's interpretation and enforcement of religious agreements.

In *Mary Elizabeth Blue Hull Memorial Church*, the Court considered a dispute over ownership of church property arising when two local churches withdrew from a hierarchical church. The local churches disagreed with several actions and pronouncements by the hierarchical church, including issues pertaining to "ordaining of women as ministers and ruling elders, . . . giving support to the removal of Bible reading and prayers by children in the public schools, adopting certain Sunday School literature and teaching neo-orthodoxy alien to the Confession of Faith and Catechisms," and "ma[king] pronouncements in matters involving

63. *Jones*, 443 U.S. at 604; *see also* BLACK'S LAW DICTIONARY 1296 (9th ed. 2009) (defining precept as "[a] standard or rule of conduct; a command or principle" and "[a] writ or warrant issued by an authorized person demanding another's action, such as a judge's order to an officer to bring a party before the court"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1783 (Philip Babcock Grove ed., 1993) (defining precept as "a command or principle intended especially as a general rule of action" or as "a written order or mandate issued by legally constituted authority to a person commanding or authorizing him to do something").

64. *Jones*, 443 U.S. at 603. The principles could, in theory, be other categories of law in particular cases.

65. *See generally* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Church, 393 U.S. 440 (1969).

international issues such as the Vietnam conflict."[66] After the hierarchical church's attempt to resolve the dispute with the local churches failed, the hierarchical church took control of the local churches' properties.[67] The local churches then filed lawsuits in Georgia, asking the courts to enjoin the hierarchical church from trespassing.[68]

In the lawsuit that followed, the jury was charged to determine whether the hierarchical church had taken actions that "amount[ed] to a fundamental or substantial abandonment of the original tenets and doctrines of the [hierarchical church]."[69] Under Georgia law, if the hierarchical church had abandoned its original tenets, then the church property would belong to the local church.[70] The jury was therefore called upon to determine what amounted to the church's original tenets and doctrines and what amounted to substantial abandonment of those principles.

When the case reached the Supreme Court, the Justices held that such an analysis was unconstitutional.[71] The Court stated,

> [T]he departure-from-doctrine element of the Georgia implied trust theory requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role.[72]

Accordingly, *Mary Elizabeth Blue Hull Memorial Church* reveals that a court's adjudication of a religious dispute will be unconstitu-

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66. *Mary Elizabeth Blue Hull Mem'l Church*, 393 U.S. at 442 n.1 (quoting Presbyterian Church v. E. Heights Presbyterian Church, 159 S.E.2d 690, 692 (Ga. 1968)) (internal quotations omitted).

67. *Id.* at 443.

68. *Id.*

69. *Id.* at 443–44 (internal quotation marks omitted).

70. *Id.* at 450.

71. *Id.*

72. *Id.*

tional if it "turn[s] on the resolution by civil courts of controversies over religious doctrine and practice."[73]

In *Serbian Eastern Orthodox Diocese*, the Court faced a different set of facts but announced a similar legal principle. The case concerned a dispute between the hierarchical Serbian Orthodox Church and the Bishop of the American-Canadian Diocese of that church, Bishop Dionisije Milivojevich.[74] The hierarchical church had suspended Milivojevich, and the dispute that followed addressed both the suspension and the question of who controlled the American-Canadian Diocese.[75] On appeal, the Supreme Court of Illinois held that "[Milivojevich's] removal and defrockment had to be set aside as 'arbitrary' because the proceedings resulting in those actions were not conducted according to the Illinois Supreme Court's interpretation of the Church's constitution and penal code."[76] The U.S. Supreme Court therefore had to consider whether a court could engage in an "arbitrariness" analysis for religious tribunal decisions.

The Court reversed, stating two principles of importance to interpretation of religious documents. First, the Court held that detailed inquiry into ecclesiastical law and polity by a civil court was itself impermissible. It stated:

> For civil courts to analyze whether the ecclesiastical actions of a church judicatory are in that sense "arbitrary" must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else in to the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this

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73. *Id.* at 450; *see also id.* at 449 (stating that "the [First] Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine").

74. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 697–98 (1976).

75. *Id.* at 698 ("The basic dispute is over control of the Serbian Eastern Orthodox Diocese for the United States of America and Canada (American-Canadian Diocese), its property and assets.").

76. *Id.* at 708.

> is exactly the inquiry that the First Amendment prohibits . . . .[77]

Additionally, the Court held that where such detailed review is necessary, courts must accept the decisions of hierarchical religious tribunals. The Court explained:

> [W]here resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them.[78]

Therefore, *Serbian Eastern Orthodox Diocese* explains that the First Amendment both forecloses "extensive" or "searching" inquiry into "religious law and polity" by civil courts, and also requires that civil courts accordingly "defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization."[79]

Such principles, in addition to those expressed in *Mary Elizabeth Blue Hull Memorial Church*, are instructive in interpreting religious documents. While not part of the "neutral principles of law approach" themselves, they are instead principles that operate concurrently with the neutral principles concept to guide a court's resolution of a case. In *Mary Elizabeth Blue Hull Memorial Church*, the Court sent a clear message that documents that require a court to resolve *doctrinal disputes* are unenforceable in

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77. *Id.* at 713; *see also id.* at 718 (stating "detailed review [is] impermissible under the First and Fourteenth Amendments" (internal quotation marks omitted)).

78. *Id.* at 709; *see also id.* at 723 ("The constitutional provisions of the American-Canadian Diocese were not so express that the civil courts could enforce them without engaging in a searching and therefore impermissible inquiry into church polity.").

79. Jones v. Wolf, 443 U.S. 595, 602 (1979) (citing the dictates of *Serbian E. Orthodox Diocese*, 426 U.S. at 724–25).

secular courts.[80] Further, even if a question does not require resolution of a doctrinal dispute, *Serbian Eastern Orthodox Diocese* explained that the Establishment Clause renders extensive inquiries into religious law and polity unconstitutional.[81] The Supreme Court reaffirmed both principles in *Jones*.[82]

Thus, despite the flexibility that the *Jones* neutral principles of law approach offers, *Mary Elizabeth Blue Hull Memorial Church* and *Serbian Eastern Orthodox Diocese* significantly restrict a court's ability to interpret and enforce a religious document. This trio of cases outlined a multi-headed legal standard for judicial analysis of religious documents: (1) courts must not resolve doctrinal disputes in adjudicating a case; (2) courts may not inquire extensively into religious doctrine or polity; (3) courts must defer, in certain circumstances, to religious tribunals; and (4) subject to the three prior rules, courts may apply traditional neutral principles of law to resolve disputes involving interpretation of religious documents.

Unfortunately, the *Jones* et al. trio established only a skeletal analysis; it does not, nor does any other Supreme Court case, expressly flesh out the applicable standard. For example, although these cases limit how far into religious law and polity a court is permitted to inquire, they do not clearly define that boundary. Moreover, while a court must undertake some inquiry into religious law and polity to determine, for example, which hierarchical court it should defer to,[83] there is no clear indication of how much

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80. Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969) (noting that "[s]tates, religious organizations, and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions"); *see also* Md. and Va. Churches v. Sharpsburg Church., 396 U.S. 367, 370 (1970) (Brennan, J., concurring) ("[G]eneral principles of property law may not be relied upon if their application requires civil courts to resolve doctrinal issues.").

81. *Serbian E. Orthodox Diocese*, 426 U.S. at 713.

82. *Jones*, 443 U.S. at 608–09.

83. *See* 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION 264 & n.61 (2008) (noting, in discussing appearance before a *beth din*, that civil courts must "determin[e] which religious tribunals have authority (within religious legal systems) to make decisions, something they must do to give effect to decisions of authoritative religious tribunals"); *cf.* Gen. Council on Fin. and Admin. v. Cal. Super. Ct., 439 U.S. 1355, 1372–73 (1978). In denying a stay, Justice Rehnquist, as circuit Justice, stated that

inquiry is too much. For guidance on that question, courts must look to yet another Establishment Clause doctrine: the *Lemon* test.

C. The Uncertain Applicability of Lemon v. Kurtzman

Jones and its coterie are of prime importance to religious document cases, but they are not the mainstays of modern Establishment Clause jurisprudence. Instead, the hallmark analysis is the *Lemon* test, so-named after *Lemon v. Kurtzman*.[84] *Lemon* set forth the baseline standard that the Supreme Court has often turned to in Establishment Clause cases, and yet, it is a standard shrouded with uncertainty. To address that uncertainty, this section considers: (1) the actual contours of the *Lemon* test in light of recent evolution in the test's case law; (2) the current validity of *Lemon* as a general Establishment Clause standard; and (3) the applicability of *Lemon* to religious document cases. On that framework, this section concludes that *Lemon* is both currently valid as an assessment tool and is a helpful addition to the religious document tool belt.

The current status of *Lemon*'s contours is in flux. To be constitutional under the test's original formulation, government action: (1) "must have a secular . . . purpose[,]" (2) "its principal or primary effect must be one that neither advances nor inhibits religion," and (3) it "must not foster an excessive government entanglement with religion."[85] The Court originally considered these prongs separately, but in recent cases such as *Agostini v. Felton*, it has apparently folded the third prong—entanglement—into the

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> In my view, applicant plainly is wrong when it asserts that the First and Fourteenth Amendments prevent a civil court from independently examining, and making the ultimate decision regarding, the structure and actual operation of a hierarchical church and its constituent units in an action such as this. There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating intrachurch disputes. But this Court never has suggested that those constraints similarly apply outside the context of such intraorganization disputes.

Id. at 372 (citation omitted).

84. 403 U.S. 602 (1971).

85. *Id.* at 612–13 (citation omitted) (internal quotation marks omitted).

second—effect.[86] Thus, the ever-controversial entanglement prong[87] appears to now only be a consideration that assists in revealing government actions that impermissibly advance religion under *Lemon*'s effects prong.[88]

Some courts, however, have continued to apply the entanglement inquiry post-*Agostini* as if entanglement was still a distinct inquiry.[89] While it is possible that *Agostini* only modified *Lemon*

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86. *See* Agostini v. Felton, 521 U.S. 203, 232–33 (1997) ("[T]he factors we use to assess whether an entanglement is 'excessive' are similar to the factors we use to examine 'effect.' . . . Thus, it is simplest to recognize why entanglement is significant and treat it—as we did in *Walz*—as an aspect of the inquiry into a statute's effect."); *see also* Zelman v. Simmons-Harris, 536 U.S. 639, 668–69 (2002) (O'Connor, J., concurring) ("In *Agostini v. Felton*, we folded the entanglement inquiry into the primary effect inquiry. This made sense because both inquiries rely on the same evidence, and the degree of entanglement has implications for whether a statute advances or inhibits religion, *see Lynch v. Donnelly*." (portions of citations omitted)).

87. *See* Bowen v. Kendrick, 487 U.S. 589, 616 (1988) ("[T]he 'entanglement' prong of the *Lemon* test has been much criticized over the years."); Stephen M. Feldman, *Divided We Fall: Religion, Politics, and the* Lemon *Entanglements Prong*, 7 FIRST AMENDMENT L. REV. 253, 264 (2009) ("No part of the *Lemon* test has proven more controversial than the entanglements prong."); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1392 (1981) ("'Entanglement' is such a 'blurred, indistinct, and variable' term that it is useless as an analytic tool." (quoting *Lemon*, 403 U.S. at 614)).

88. *See, e.g.*, Feldman, *supra* note 87, at 273 ("*Lemon*, it seemed, had become a two-pronged test, examining purpose and effects."); *see also* Mitchell v. Helms, 530 U.S. 793, 807–08 (2000) (plurality opinion) ("Whereas in *Lemon* we had considered whether a statute (1) has a secular purpose, (2) has a primary effect of advancing or inhibiting religion, or (3) creates an excessive entanglement between government and religion, in *Agostini* we modified *Lemon* for purposes of evaluating aid to schools and examined only the first and second factors." (citations omitted)).

89. *See* Am. Atheists Inc. v. Duncan, 616 F.3d 1145, 1156 (10th Cir. 2010) (citing the third prong), *modified on reh'g and reh'g en banc denied*, 637 F.3d 1095 (10th Cir. 2010); Summers v. Adams, 669 F. Supp. 2d 637, 657–58, 664–65 (D.S.C. 2009) (finding a violation under all three prongs). Other courts are incorporating the third prong into the second as indicated in *Agostini*. *See, e.g.*, Does v. Enfield Public Schs., 716 F. Supp. 2d 172, 186 (D. Conn. 2010) ("incorporat[ing] the analysis of whether . . . an 'excessive entanglement' with religion [exists in] the second prong of the *Lemon* test"); *cf.* Incantalupo v. Lawrence Union Free Sch. Dist. No. 15, 652 F. Supp. 2d 314, 322–23 n.7 (E.D.N.Y.

as to factual scenarios akin to *Agostini*'s—e.g., "for purposes of evaluating aid to schools" only and not for all instances in which *Lemon* is applied[90]—there are no clear indications of that from the Court. Further, wherever *Lemon*'s third prong is considered in the analysis, the Court's demotion of "excessive entanglement" to a subsidiary element of the effects prong in at least some contexts demonstrates a de-emphasis on entanglement concerns under the Clause. Therefore, while the exact contents of the *Lemon* test are something of a mystery in modern jurisprudence, it is clear that the test still involves an inquiry into whether the government acted with a secular purpose,[91] and it is still clear that the test prohibits government actions that have a primary effect of advancing or inhibiting religion. At the same time, it is evident that the presence of church-state entanglement is less dispositive in recent years than it was at the test's birth.

Even with such a framework in mind, however, one must question whether the *Lemon* test is still a valid Establishment Clause test. Despite its continued existence, the status of the *Lemon* test in general Establishment Clause jurisprudence is classically uncertain. From the test's formal birth in 1971,[92] the Court has applied it in several cases and a variety of contexts, and neverthe-

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2009) ("Recent Supreme Court cases have focused on just the first two prongs . . . . But, once again, the Second Circuit has apparently not followed the Supreme Court's guidance, and continued to apply the full three part *Lemon* test. Consequently, so does this Court." (citations omitted)).

90. *See Mitchell*, 530 U.S. at 807–08 (plurality opinion) ("Whereas in *Lemon* we had considered whether a statute (1) has a secular purpose, (2) has a primary effect of advancing or inhibiting religion, or (3) creates an excessive entanglement between government and religion, in *Agostini* we modified *Lemon for purposes of evaluating aid to schools* and examined only the first and second factors." (emphasis added) (citations omitted)); *see also* Mark Strasser, *Repudiating* Everson*: On Buses, Books, and Teaching Articles of Faith*, 78 MISS. L.J. 567, 628 (2009) ("The Court noted that the factors we use to assess whether an entanglement is excessive are similar to the factors we use to examine effect, and thereby made the three-part Lemon Test into a two-part test, *at least for purposes of determining whether aid to sectarian schools violated the Establishment Clause*." (emphasis added) (footnotes omitted) (internal quotation marks omitted)).

91. *See, e.g.*, McCreary County, Kentucky v. ACLU of Ky., 545 U.S. 844, 859–60 (2005) (citing and applying *Lemon*'s purpose prong).

92. *Id.*

less, several Justices have expressed doubt over its validity.[93] In fact, a plurality of the Court recently noted *Lemon*'s questionable role in future Establishment Clause jurisprudence.[94] On the other hand, decisions in the last decade have expressly applied or cited approvingly to the *Lemon* analysis,[95] and the Court has rejected prior requests to jettison *Lemon*.[96] Thus, given *Lemon*'s long history at the Court, the fact that it has shown remarkable staying power in the face of vivid and repeated criticism, and the fact that the Court relied on it in one of its most recent opinions,[97] it seems that—at least for now—*Lemon* is still a valid tool for assessing an alleged Establishment Clause violation.

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93. Justice Scalia has been one of *Lemon*'s most vocal critics. *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring). In his concurring opinion, Justice Scalia stated:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys . . . . Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision in *Lee v. Weisman* conspicuously avoided using the supposed "test" but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion [Justice White] repeatedly), and a sixth has joined an opinion doing so.

Id. at 398 (citation omitted) (citing cases wherein Justices Scalia, Thomas, Kennedy, O'Connor, Rehnquist, and White criticized *Lemon*).

94. *See* Van Orden v. Perry, 545 U.S. 677, 686 (2005) ("[J]ust two years after *Lemon* was decided, we noted that the factors identified in *Lemon* serve as 'no more than helpful signposts.' Many of our recent cases simply have not applied the *Lemon* test. . . . Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with [the case before us].") (plurality opinion of Rehnquist, C.J.) (quoting Hunt v. McNair, 413 U.S. 734, 741 (1973)).

95. *See McCreary County*, 545 U.S. at 859–60 (citing and applying *Lemon*'s purpose prong); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314–16 (2000) (citing and applying *Lemon*'s purpose prong).

96. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 587 (1992) ("We do not accept the invitation of petitioners and *amicus* the United States to reconsider our decision in *Lemon v. Kurtzman*.").

97. *See McCreary County*, 545 U.S. at 859–60 (decided in 2005).

Yet, despite its general validity, *Lemon*'s applicability to religious document cases is still questionable. The church property cases decided after *Lemon* did not explicitly apply or cite the *Lemon* analysis,[98] and this could suggest that *Lemon* does not govern religious document cases. On the other hand, some courts have applied *Lemon* as the governing standard,[99] and commentators have occasionally assessed religious contract cases under *Lemon*'s rubric.[100] There is thus some support among case law and secondary sources for looking to *Lemon* to reveal Establishment Clause violations in religious document cases.

There is also some support in Supreme Court jurisprudence. In both *Jones* and *Serbian Eastern Orthodox Diocese*, the Court used language that resembled *Lemon*'s prongs. In *Serbian Eastern Orthodox Diocese*, the Court noted that in church property disputes, "there is substantial danger that the State will become *entangled* in essentially religious controversies or *intervene on behalf* of groups espousing particular doctrinal beliefs."[101] This analysis resembles *Lemon*'s prohibition on governmental actions that have "a primary effect of advancing or inhibiting religion" and actions that create "excessive entanglement" between the govern-

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98. *See* Jones v. Wolf, 443 U.S. 595 (1979); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976). Similarly, neither case cited *Lemon*'s sister case that sets forth the same three-pronged test, *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

99. *See In re* Marriage of Goldman, 554 N.E.2d 1016, 1023 (Ill. App. Ct. 1990) (applying the *Lemon* test, the endorsement test, and *Jones*); Minkin v. Minkin, 434 A.2d 665, 667–68 (N.J. Super. Ct. Ch. Div. 1981) (applying the three-part test discussed in *Lemon* but citing to *Lemon*'s sister case, Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973)); Basinger v. Pilarczyk, 707 N.E.2d 1149, 1150 (Ohio Ct. App. 1997) (citing *Lemon*, the court ruled that "[t]he trial court's examination of the conditions of employment at a church-operated school involves a significant risk of government-religion entanglement and gives rise to a clear violation of the First Amendment"); *cf.* Zummo v. Zummo, 574 A.2d 1130, 1146 (Pa. Super. Ct. 1990) (plurality opinion) (applying *Lemon* in the context of an agreement to raise the children in the Jewish faith).

100. *See generally* David M. Cotter, *Constitutional Questions Concerning the Enforcement of Islamic Antenuptial Agreements*, 15 DIVORCE LITIG. 45 (2003); Greenberg-Kobrin, *supra* note 17 at 380–82.

101. *Serbian E. Orthodox Diocese*, 426 U.S. at 709 (emphasis added).

ment and religion.[102] Similarly, in *Jones*, the Court described the neutral principles of law approach as "free[ing] civil courts completely from entanglement in questions of religious doctrine, polity, and practice."[103] The Court also went on to discuss whether neutral principles would result in more or less entanglement than alternative models.[104] Thus, both *Jones* and *Serbian Eastern Orthodox Diocese* drew on similar concepts as the *Lemon* test.[105] While this suggests *Lemon* has relevance to church property cases, it is also suggestive of *Lemon's* relevance to religious contract cases.

Hence, although it is debatable, this Article concludes that *Lemon* can in fact assist in demarcating the Establishment Clause boundaries in religious document cases. To some extent, *Lemon* simply duplicates the Establishment Clause standards elsewhere established. For example, a proper application of the cases discussed in this part should itself avoid the violations to which *Lemon* tests are typically applied. After all, by declining to resolve doctrinal disputes, courts avoid advancing or inhibiting religion and avoid acting with an improper religious motive—*Lemon*'s first and second prongs. Moreover, by relying on neutral principles of law and refusing to engage in extensive inquiry into religious doctrine, courts avoid excessive entanglement.[106] Conceived in this regard, *Lemon* serves as both the silent force behind the neutral

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102. Lemon v. Kurtzman, 403 U.S. 602, 612–614 (1971); *see also* 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION 262 (2006) ("Although the courts' approach to property disputes differs from standard free exercise and establishment tests, it reflects modern attention to equality in constitutional law and the dominant theme of religion-clause adjudication, that too much intertwining of government and religion is unhealthy." (footnote omitted)).

103. *Jones*, 443 U.S. at 603.

104. *Id.* at 604–06.

105. *Cf.* Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of* Smith, 2004 BYU L. REV. 1633, 1644 (2004) (noting that "[j]ust as in *Wolf*, the Court in *Hull* appeared to give priority to entanglement concerns [in its analysis]" and linking that concern to Free Exercise Clause matters).

106. As already noted, however, *Lemon*'s third prong is of questionable independent potency since it has been folded into *Lemon*'s second prong. *See supra* note 86 and accompanying text.

principles analysis and as an additional marker of the boundaries of the neutral principles model.[107]

Lemon also offers assistance in identifying violations because it introduces into the conversation additional guidance from cases addressing the Establishment Clause. There are scant few church property cases to illuminate the gray areas of *Jones*, *Mary Elizabeth Blue Hull Memorial Church*, and *Serbian Eastern Orthodox Diocese* that courts might face in attempting to interpret and enforce a given religious document. *Lemon*, however, is a more common subject of judicial discussion. By looking to *Lemon* and the Supreme Court's cases discussing it, courts can infer additional guidance as to the appropriate method for adjudicating religious document cases.

The most unsettled question arising from *Jones* and its related cases is how far courts can look into religious doctrine, polity, and practices when interpreting a religious document. If an Islamic marriage contract states that the husband is only obligated to pay the wife the *mahr* "when required by *Shari'a*," may the court inquire into what Islam's divine law in fact states?[108] It is clear that courts cannot resolve doctrinal disputes that they encoun-

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107. It is also hard to imagine a case that involved a clear violation of the *Lemon* test and yet was otherwise constitutional. *But see* Marsh v. Chambers, 463 U.S. 783 (1983).

108. Interestingly, given the recent referendum in Oklahoma amending its state constitution to forbid courts from considering or using international law or *Shari'a* Law, it might be impossible for a state court in Oklahoma to inquire into *Shari'a* consistent with Oklahoma's amended constitution. *See* H.R.J. Res. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010), https://www.sos.ok.gov/ documents/questions/ 755.pdf; *see also* Michael Crowley, *Ballot Measure Update: Oklahoma Safe from Sharia Law*, TIME.COM SWAMPLAND: POL. INSIGHT FROM THE BELTWAY AND BEYOND (Nov. 2, 2010), http://swampland.blogs.time.com/2010/11/02/ballot-measure-update-oklahoma-safe-from-sharia-law/.

As of November 9, 2010, the constitutional amendment was under a temporary restraining order issued by federal judge Vick Miles LaGrange precluding its application. The proponent of the lawsuit noted that "the measure could preclude the courts from enforcing or executing [my] will, since it includes references to Islamic law." Josh Gerstein, *Judge Blocks Oklahoma Ban on Sharia Law*, POLITICO.COM (Nov. 8, 2010, 2:05 PM), http://www.politico.com/blogs/joshgerstein/1110/Judge_blocks_Oklahoma_ban_on_Sharia_law.html.

ter in such an inquiry,[109] yet there is otherwise no clear answer to the question of how much courts may inquire. *Lemon* and its progeny, however, arguably help reveal the answer.

The primary Establishment Clause violation that courts risk when inquiring into religious law and polity is an entanglement-based problem. If the court simply looks at and interprets religious law, it does not, in doing so, advance religion under *Lemon's* second prong. Nor is, presumably, the court inquiring into anything other than a secular purpose, thereby avoiding a violation of *Lemon*'s first prong. The court is, however, intertwining state tendrils with religious affairs. This alone presents a potential entanglement problem. Nevertheless, recent Supreme Court jurisprudence applying *Lemon—Agostini* and *Mitchell*—has, at a minimum, significantly undercut the potency of the entanglement prong,[110] and it is possible that the entanglement inquiry has been completely absorbed into the effects prong.[111] If that is indeed the case and no significant effect on religion arises from a court performing its traditional fact-finding function for religious matters, then under the current form of the *Lemon* test as modeled in *Agostini* and *Mitchell*, there is no Establishment Clause violation when a court inquires into religious law and polity.

Although permitting such fact-finding invites much debate, there is merit in allowing courts to inquire into religious doctrine,

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109. *See supra* notes 74–82 and accompanying discussion (citing Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) and Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969)).

110. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 668–69 (2002) (O'Connor, J., concurring) ("In *Agostini v. Felton,* we folded the entanglement inquiry into the primary effect inquiry. This made sense because both inquiries rely on the same evidence, and the degree of entanglement has implications for whether a statute advances or inhibits religion." (citations omitted)); Agostini v. Felton, 521 U.S. 203, 232–33 (1997) ("[T]he factors we use to assess whether an entanglement is 'excessive' are similar to the factors we use to examine 'effect.' . . . Thus, it is simplest to recognize why entanglement is significant and treat it—as we did in *Walz*—as an aspect of the inquiry into a statute's effect.").

111. *See* Feldman, *supra* note 87, at 273 ("*Lemon*, it seemed, had become a two-pronged test, examining purpose and effects."); *see also* Mitchell v. Helms, 530 U.S. 793, 807–08 (2000) (plurality opinion) ("[I]n *Agostini* we modified *Lemon* for purposes of evaluating aid to schools and examined only the first and second factors.").

polity, and practices. In fact, the Supreme Court itself has implicitly recognized this by engaging in such inquiries.[112] In several opinions, the Court has interpreted and described the beliefs and practices of several religions, including Christianity, Judaism, and Scientology.[113] These inquiries should not be surprising. First Amendment cases involving disputes between religious parties often require examining the context of the religious dispute, if for no other reason than to understand the nature and origin of the alleged wrong. If a court is charged to resolve the dispute,[114] how

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112. The Court has inquired into religious practices, beliefs, and doctrine via basic fact-finding both in individual justices' opinions and also in majority opinions. *See* Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 6 (1929) (observing that "[e]ver since the Council of Trent (1545–1563), it has been the law of the church that no one can be appointed to a collative chaplaincy before his fourteenth year"); *see also* Van Orden v. Perry, 545 U.S. 677, 690 (2005) (discussing the origin of the Ten Commandments); Emp't Div. v. Smith, 494 U.S. 872, 903–04 (1990) (O'Connor, J., concurring) (concluding that "[p]eyote is a sacrament of the Native American Church"); *id.* at 914–15, 919–20 (Blackmun, J., dissenting) (concluding that "[n]ot only does the church's doctrine forbid nonreligious use of peyote; it also generally advocates self-reliance, familial responsibility, and abstinence from alcohol.") (citing Brief for Ass'n of Am. Indian Affairs et al. as Amici Curiae Supporting Respondent, *Emp't Div., Dep't of Human Res. of Or.*, 494 U.S. 872 (No. 88-1213), 1989 WL 1126853; Olsen v. Drug Enforcement Admin., 878 F.2d 1458, 1464 (D.C. Cir. 1989); People v. Woody, 394 P.2d 813, 818 n.3 (Cal. 1964) (en banc)); County of Allegheny v. ACLU, 492 U.S. 573, 579–87 (1989) (interpreting the religious significance of, for example, a crèche, Christmas, and Chanukah and citing and quoting repeatedly the Bible, the Talmud, multiple religious encyclopedias, and several books and articles on Christian and Jewish holidays and religious observations for each); Hernandez v. Comm'r, 490 U.S. 680, 684–85 (1989) (describing the beliefs and practices of Scientology); *Gonzalez*, 280 U.S. at 13–15 (quoting and interpreting canons of the *Codex Juris Canonici*).

113. *See* cases cited *supra* note 112.

114. *See* Watson v. Jones, 80 U.S. 679, 714 (1871) ("Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints."); McKelvey v. Pierce, 800 A.2d 840, 844 (N.J. 2002) ("The First Amendment does not immunize every legal claim against a religious institution and its members."); Hardwick v. First Baptist Church, 524 A.2d 1298, 1301 (N.J. Super. Ct. App. Div. 1987) ("Although the church is a religious institution and entitled to protection from civil interference, it is also a religious corporation whose members are entitled to rights afforded by statute."); S. Ohio

can it avoid the investigation required to resolve the case without also avoiding the charge?[115] In some cases it cannot. Thus, the Supreme Court recognizes that some inquiry will be required in a number of religious cases.

Once it is a given that some inquiry is required to address many religious disputes, it is equally clear that drawing lines between permissible inquiry and prohibited inquiry is difficult. Should a court distinguish between historical inquiry—a question about, for example, how a religious holiday came to pass—and an interpretation of the holiday's meaning in light of that origin? Which sources would be permissible, and which would be prohibited? Could a court consult an encyclopedia describing religion but not a religious encyclopedia?[116] Could it review an affidavit in the record from an individual quoting his religious beliefs but then not look into the religious work in question, even if the court merely sought to see if the work actually contains the words the party quoted? Where would the line be between reading a scholarly article about religious beliefs and reading the doctrine that the article was considering? While these questions do not dictate that a court must be permitted to inquire into religious law, they nevertheless illustrate that if inquiry is permissible, it will be difficult to contain.

On the other hand, if inquiry is impermissible, the results could be deeply troubling. Because the Establishment Clause applies to more than just the judiciary, a prohibition on inquiry into

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State Exec. Officers of Church of God v. Fairborn Church of God, 573 N.E.2d 172, 180 (Ohio Ct. App. 1989) ("[C]ourts cannot avoid their responsibility to resolve a dispute civil in character because the litigants are religious bodies."); *cf.* Elmora Hebrew Ctr., Inc. v. Fishman, 593 A.2d 725, 729 (N.J. 1991) ("[C]ourts have the power, and perhaps a duty as well, to enforce secular contract rights, despite the fact that the contracting parties may base their rights on religious affiliations.").

115. This is not to suggest, however, that the general duty of a court to resolve disputes somehow negates the overriding requirement that courts act constitutionally, i.e., within the boundaries of the First Amendment. The intended point is observational: if a court is called upon to resolve a religious dispute it will at times be required to engage in some basic fact-finding inquiry into religious matters.

116. *Cf. County of Allegheny*, 492 U.S. at 579–87 (interpreting the religious significance of a crèche, Christmas, and Chanukah and repeatedly citing and quoting multiple religious encyclopedias).

religious law would impact more than the ability of courts to adjudicate significant and important disagreements between religious parties. It would also limit the legislative and executive branches in faith-based matters, thereby crippling their efforts at governance. After all,

> [v]alues that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.[117]

Congress and the state legislatures have routinely attempted to accommodate religious practices through legislative action,[118] but how could those laws ever be intelligently crafted if legislative bodies were precluded from making fact-based inquiries into the religious beliefs, practices, and needs of the accommodated constituents?[119] Similarly, how would each branch accommodate reli-

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117. *Smith*, 494 U.S. at 890.

118. *See id.* at 920–21 (Blackmun, J., dissenting), (noting that Congress recognized that peyote and other substances "have religious significance because they are sacred, they have power, they heal, they are necessary to the exercise of the rites of the religion, they are necessary to the cultural integrity of the tribe, and, therefore, religious survival" (quoting H.R. REP. NO. 95-1308, at 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1262, 1263)).

119. *See* Jared A. Goldstein, *Is There a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 543 (2005) ("Congress and the executive branch more generally are also authorized to make positive assessments about the content of religious beliefs and practices. The political branches are understood to have authority to establish exemptions from generally applicable laws for religious conduct, and they may do so based on examination and assessment of religious practices and beliefs. . . . If the political branches could not make such positive declarations regarding the content of religious practices and beliefs, the government could never act to accommodate religion." (citing Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335

gion among the branch's internal operations without assessing religious matters? For example, consider the need to hire and provide chaplains to military members serving abroad. Absent some religious inquiry, there can be no informed decision regarding a chaplain's eligibility for the position or his or her appropriateness for the faith-based community to be served.[120]

There are at least two responses to these difficulties: allow some inquiry into religion or foreclose inquiry completely. There are commentators and courts on both sides of the issue, arguing separately that the Court's Establishment Clause jurisprudence can be read to require either option.[121] However, as this Article has argued, there is room in the Court's existing jurisprudence authorizing and guiding basic inquiry into religious law and polity.[122] That inquiry does, however, have limits. While some recent cases applying *Lemon* could arguably be read to supersede even the earlier prohibition on "*extensive* inquiry" into religious law—on the theory that the original prohibition was grounded in entanglement concerns and recent cases have relaxed the prohibition on state-religion interaction—this Article does not go quite so far. Al-

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(1987)); *see also Amos*, 483 U.S. at 335 ("[I]t is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."); McDaniel v. Paty, 435 U.S. 618, 639 (1978) (Brennan, J., concurring) ("[G]overnment [may] take religion into account . . . to exempt, when possible, from generally applicable governmental regulation individuals whose religious beliefs and practices would otherwise thereby be infringed . . . .").

120. *See* Goldstein, *supra* note 119, at 525–33 (raising this question and others).

121. *Cf.* Brady, *supra* note 105, at 1689 ("Courts are not fit to interpret religious doctrine and engage in religious questions."); Goldstein, *supra* note 119, at 512–13 (concluding that "[c]ases following *Presbyterian Church*, however, eliminate any residual authority for courts to construe religious terms, however clearly expressed" but arguing that it would be preferable if courts could inquire into religious issues).

122. *See* discussion *supra* this Part; *see also* Agostini v. Felton, 521 U.S. 203, 233 (1997) ("Interaction between church and state is inevitable and we have always tolerated some level of involvement between the two. Entanglement must be 'excessive' before it runs afoul of the Establishment Clause." (citation omitted)); *id.* at 233–34 ("Under our current understanding of the Establishment Clause, [that a program required administrative cooperation between the government and a religious entity is] insufficient by [itself] to create an 'excessive' entanglement.").

though the Court might in its next religious document case allow even extensive factual inquiry into religious matters, it has not committed itself to such a destination.[123] Until it does, courts should adhere to the Supreme Court's existing case law under *Jones* et al. and *Lemon*.[124] Nevertheless, courts should not only recognize that traditional fact-finding inquiries into religion are permissible, but insofar as courts do not resolve any doctrinal disputes or engage in broad-sweeping reviews, they should recognize that basic inquiry is desirable.

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123. Rather, to the contrary, the Court has done nothing but obscure the path. In its most recent cases specifically discussing the *Lemon* test in full, the Court seemed to suggest that it was now a two-prong test that contemplated entanglement as problematic only in light of the second prong. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 668–69 (2002) (O'Connor, J., concurring) ("In *Agostini v. Felton*, we folded the entanglement inquiry into the primary effect inquiry." (citation omitted)); Mitchell v. Helms, 530 U.S. 793, 807–08 (2000) ("Whereas in *Lemon* we had considered [all three prongs], in *Agostini* we modified *Lemon* for purposes of evaluating aid to schools and examined only the first and second factors." (citation omitted)); *Agostini*, 521 U.S. at 233 ("[I]t is simplest to recognize why entanglement is significant and treat it—as the Court did in *Walz*—as an aspect of the inquiry into a statute's effect."). Yet those same cases leave open the possibility that the Court only modified *Lemon*'s third prong as to school aid cases. Other recent cases citing *Lemon* have mentioned it was a three-prong test without applying the third prong or clarifying its current validity. *See* McCreary County v. ACLU of Ky., 545 U.S. 844, 859 (2005) (noting that "*Lemon v. Kurtzman* summarized the *three* familiar considerations for evaluating Establishment Clause claims" but then focusing only on the secular purpose prong of the test) (emphasis added); *id.* at 883 (O'Connor, J., concurring) (noting that the state "may not entangle itself with religion" but citing *Walz* for that rule—just as she did in discussing the modification in *Agostini*); *see also* Salazar v. Buono, 130 S. Ct. 1803, 1812 (2010) (noting the district court's application of the third prong of the *Lemon* test but not clarifying or applying the prong); Van Orden v. Perry, 545 U.S. 677, 685–86 (2005) (declining to apply, much less elaborate on, the *Lemon* test's current status).

124. *See, e.g.*, *Agostini*, 521 U.S. at 237 ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that '[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'" (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989))).

D. Summary of Establishment Clause Limitations

As the foregoing illustrates, the Establishment Clause plays a significant role in analyzing religious documents, limiting both the adjudication process and its outcome. Through extension of the neutral principles of law approach described in *Jones*, civil courts have a mechanism for avoiding Establishment Clause violations when interpreting and enforcing religious documents. Even when applying neutral principles, however, courts are still constrained. First, courts may not conduct an excessively "detailed inquiry"[125] into religious law or polity, and they also cannot compel participation in a religious exercise.[126] Moreover, despite *Lemon's* marked history, courts must contend with its standard. To borrow Justice Scalia's words from another context, the *Lemon* test lurks in the background of all religious document cases "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried."[127] Although it is not definitively certain whether *Lemon* governs the analysis of religious document cases, this Article argues that *Lemon* is helpful in identifying Establishment Clause violations.

IV. RELIGIOUS DOCUMENTS IN STATE AND FEDERAL COURTS

Even if the judicial bounds of the Establishment Clause can be measured, the Clause's specific applicability to religious documents demands further examination. Although the Supreme Court has only rarely addressed religious documents, lower state and federal courts have confronted them in far greater numbers. Two types of cases have come before the courts frequently: cases involving religious property disputes and cases involving marriage contracts from Jewish and Islamic couples. However, religious documents have also been reviewed in other contexts, including

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125. *See, e.g.*, Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 718 (1976) (stating that a "'detailed review' [was] impermissible under the First and Fourteenth Amendments").

126. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 312 (2000); Lee v. Weisman, 505 U.S. 577, 598 (1992).

127. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring); *see also supra* note 93.

employment contracts,[128] arbitration clauses,[129] child custody agreements,[130] and various other documents touching on religious matters or invoking religious language.[131] Because drawing from these cases is helpful in identifying the types of issues courts face when asked to interpret religious documents, this Part surveys federal and state decisions from around the country.

Perhaps the best known religious document case is *Avitzur v. Avitzur*, a dispute involving a religious marriage agreement.[132] In *Avitzur*, the defendant–husband obtained a divorce from his plaintiff–wife, and the wife thereafter filed a lawsuit seeking to compel him to appear before a *beth din*.[133] The wife based her claim for relief on their marriage contract, the *ketubah*.[134] The trial court concluded that the lawsuit was simply seeking to "command upon the [husband] to do what is alleged he agreed to do in advance."[135] On appeal, however, the intermediate appellate court disagreed. It concluded:

> The agreement which plaintiff is attempting to specifically enforce was entered into as part of a religious ceremony and, by its own terms, was "ex-

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128. *See* cases cited *supra* note 7.

129. *See* cases cited *supra* note 8.

130. *See, e.g.*, Zummo v. Zummo, 574 A.2d 1130 (Pa. Super. Ct. 1990) (plurality opinion) (addressing an oral agreement to raise the children in the Jewish faith, in the context of an order forbidding the father taking the children to non-Jewish religious services).

131. *See, e.g.*, Nat'l Grp. for Commc'ns & Computers Ltd. v. Lucent Techs. Int'l Inc., 331 F. Supp. 2d 290 (D.N.J. 2004) (addressing a choice of law provision that set Saudi Arabia's divine law as applicable); *cf.* Miller v. Miller, 620 A.2d 1161, 1168 (Pa. Super. Ct. 1993) (Johnson, J., dissenting) (quoting a case not raising Establishment Clause issues, a Christian Conciliation agreement addressing marital dissolution, child custody, and arbitration, among other matters).

132. Avitzur v. Avitzur, 446 N.E.2d 136 (N.Y. 1983).

133. Avitzur v. Avitzur, 449 N.Y.S.2d 83 (N.Y. App. Div. 1982) (intermediate appellate court proceedings), *rev'd*, 446 N.E.2d 136 (N.Y. 1983). A *beth din* is "a rabbinical tribunal commonly comprised of three rabbis, or one rabbi and two lay persons, assembled to decide matters of Jewish law or resolve disputes." *See* Breitowitz, *supra* note 15, at 326; *supra* note 24 and accompanying text.

134. *Avitzur*, 449 N.Y.S.2d at 84.

135. *Id.* (quoting the trial court).

> ecuted and witnessed . . . in accordance with Jewish law and tradition." The State, having already 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. . . . The sole purpose behind compelling this appearance [before a *beth din*] is to enable plaintiff to obtain a religious divorce so that she may at some time in the future marry in accordance with her religious beliefs.[136]

As a result, the court held that the husband's motion to dismiss should have been granted, and the wife appealed.

In the Court of Appeals of New York, the judges split four to three on the issue. The majority concluded that the *ketubah* could be enforced without violating the First Amendment, while the dissent argued that any enforcement of the *ketubah* would necessarily entangle the court in "matters of religious and ecclesiastical content."[137] Both the majority and dissent began by emphasizing the language of the agreement itself. The agreement read in full:

> On the First Day of the Week, the 3rd Day of the Month Sivan, 5726, corresponding to the 22nd Day of May, 1966, Boaz Avitzur, the bridegroom, and Susan Rose Wieder, the bride, were united in marriage in Old Westbury, N.Y. The bridegroom made the following declaration to his bride: "Be thou my wife according to the law of Moses and Israel. I shall honor and support thee, faithfully I shall cherish thee and provide for thy needs, even as Jewish husbands are required to do by our religious law and tradition."

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136. *Id.*

137. *See Avitzur*, 446 N.E.2d at 136–37 (Wachtler, J., for the Court); *id.* at 139 (Jones, J., dissenting).

> In turn, the bride took upon herself the duties of a Jewish wife, to honor and cherish her husband, and to carry out all her obligations to him in faithfulness and affection as Jewish law and tradition prescribe.
>
> And in solemn assent to their mutual responsibilities and love, the bridegroom and bride have declared: 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 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 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.
>
> This Ketubah was executed and witnessed this day in accordance with Jewish law and tradition.
>
> Boaz Avitzur bridegroom Susan Wieder bride Melvin Kieffer rabbi Abraham Weisman witness Melvin Kieffer witness.[138]

In reaching its decision, the majority emphasized the third paragraph in which the parties stated that they "agree[d] to recognize the Beth Din . . . as having authority to counsel [them] in the light of Jewish tradition . . . ."[139] The court concluded that the wife "[was] not attempting to compel [the] defendant to obtain a Get or

138. *Id.* at 140 (Jones, J., dissenting).
139. *Id.* at 137.

to enforce a religious practice arising solely out of principles of religious law," but rather, the court suggested that the wife merely sought "to enforce an agreement made by [the] defendant to appear before and accept the decision of a designated tribunal."[140] The majority then held that the case could be decided using only neutral principles of contract law, citing to *Jones*, and acknowledged that despite "the religious character of the Ketubah," the court could still enforce its "purely secular terms."[141] Endorsing the possibility of compelling the husband to submit to a *beth din*, the court reversed.[142] The United States Supreme Court denied the husband's petition for review.[143]

The three dissenting judges of the Court of Appeals of New York began their analysis by noting agreement with the majority that the proper analytical model was to apply neutral principles of law in the interpretation and enforcement of the agreement.[144] Nevertheless, because both the husband and the wife had proffered conflicting interpretations of the document and of Jewish law, the dissenting judges concluded that "any judicial determination whether the husband is obligated to appear before the beth din . . . necessarily involve[d] reference to substantive religious and ecclesiastical law."[145] Moreover, based on the evidence that the wife had submitted to support her motion in the trial court, the dissent predicted that any new proceedings would involve the introduction of expert witness testimony concerning Jewish law and tradition.[146] In light of this entanglement with religion and the dissenters' belief that the parties never intended the agreement to empower civil courts to determine their substantive rights, the dissent concluded that the *ketubah* could not be enforced to require the husband to appear before a *beth din*. The dissent regarded the matter as "well beyond the authority of any civil court" because the ultimate goal

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140. *Id.* at 138.

141. *Id.*

142. *Id.* at 139.

143. Avitzur v. Avitzur, 464 U.S. 817 (1983) (denying petition for writ of certiorari without elaboration).

144. *Avitzur*, 446 N.E.2d at 139 (Jones, J., dissenting).

145. *Id.* at 141 (Jones, J., dissenting).

146. *Id.* at 141–42 (Jones, J., dissenting).

of compelling the husband to appear before the *beth din* would be for the wife to obtain a religious divorce.[147]

While undoubtedly informative, *Avitzur* is far from the only decision interpreting religious marriage agreements. For example, in *In re Marriage of Goldman*, an Illinois appellate court faced similar facts to those in *Avitzur*.[148] In *Goldman*, however, a wife was specifically seeking to compel her husband to provide her with a *get*.[149] Although their *ketubah* contained language similar to the *ketubah* in *Avitzur*,[150] it did not expressly discuss the husband providing the wife with a *get* in the event of divorce.[151]

Yet, while the *ketubah* did not specifically mention a *get*, Annette—the wife—was able to introduce significant evidence supporting her claim against Kenneth—the husband.[152] For instance, Annette claimed that Kenneth had insisted on giving his prior wife a *get* and that he specifically asked the clerk for an Orthodox *ketubah* when both he and Annette selected one for their own marriage. Furthermore, when Annette asked if a *get* was real-

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147. *Id.* at 142 (Jones, J., dissenting).

148. *In re* Marriage of Goldman, 554 N.E.2d 1016, 1018 (Ill. App. Ct. 1990).

149. *Id.* at 1018.

150. The language of the *ketubah* in *Goldman* was:

> The said Bridegroom made the following declaration to his Bride:
>
> "Be thou my wife according to the law of Moses and Israel. I faithfully promise that I will be a true husband unto thee; I will honor and cherish thee; I will work for thee; I will protect and support thee, and will provide all that is necessary for thy sustenance, even as it beseemeth a Jewish husband to do. I also take upon myself all further obligations for thy maintenance, as are prescribed by our religious statute."
>
> And the said Bride has plighted her troth unto him, in affection and in sincerity, and has thus taken upon herself the fulfillment of all the duties incumbent upon a Jewish wife.
>
> This Covenant of Marriage was duly executed and witnessed this day according to the usage of Israel.

Id. at 1018–19.

151. *Id.* at 1018–20.

152. *Id.* at 1019–20.

ly necessary, she claimed Kenneth told her that marrying into the Jewish faith requires "get[ting] divorced according to the Jewish faith." In general, Annette's testimony indicated that she and her husband understood "the law of Moses and Israel" to require the provision of a *get* under the *ketubah*, as that law governed their marriage. Supplementing Annette's own proof was expert testimony by two Orthodox rabbis who explained that Judaism contains secular as well as religious laws and that the *ketubah* and marriage contracts were secular contracts. Moreover, while the rabbis testified that the termination of the marriage under Orthodox Jewish law required the giving of a *get*, they suggested the *get* procedure was "secular rather than religious in nature," notwithstanding its several formalities.[153]

In response, Kenneth also offered evidence relating to the *ketubah*. Notably, he introduced a deposition from the rabbi who officiated the marriage wherein the rabbi stated that the *ketubah* was more symbolic than literal, and Kenneth also testified that he viewed the *ketubah* as poetry or art as opposed to a contract.[154] In addition, Kenneth testified "at great length as to his dislike for Orthodox Judaism" because he believed that Orthodox Judaism discriminated against women.[155]

The trial court ruled that the parties intended Orthodox Jewish law to govern the marriage and that the expert testimony demonstrated that Orthodox Judaism required Kenneth to give Annette a *get*. The trial court thus dissolved the marriage and ordered the husband to provide Annette, either himself or by proxy, with a *get*.[156] On appeal, the appellate court applied *Lemon*, looking to Justice O'Connor's endorsement test for additional guidance.[157] Affirming the lower court's decision, the appellate court held that enforcing the *ketubah*: (1) had a secular purpose in protecting the right to contract and fostering dissolution, (2) would not have a primary effect that advanced or inhibited religion in light of testimony that providing a *get* was a secular act, and (3) would avoid

153. *Id.* at 1020.

154. *Id.*

155. *Id.*

156. *Id.* at 1021.

157. *Id.* at 1022–23; *see* Lynch v. Donnelly, 465 U.S. 668, 688–89 (1984) (O'Connor, J., concurring) (describing the endorsement test).

excessive entanglement because the court relied on neutral principles of contract law, not "consideration of doctrinal matters."[158] Finally, the appellate court held that Kenneth's free exercise rights were not violated and noted that his dislike of Orthodox Judaism "did not rise to the level of a religious belief."[159] The court then concluded that he was not being compelled to participate in any religious act.[160]

Like *Avitzur*, however, the dissent in *Goldman* argued that enforcing the *ketubah* "require[d] interpretation of religious doctrines and . . . worship," in addition to requiring "[Kenneth's] involvement in an act of religious worship."[161] Further reasoning that "[a]n individual's participation, even by proxy, in a religious ritual is a form of religious worship," the dissent stated that a "civil court has no right to dictate one's religion or the form in which one practices the religion of his choice."[162] Moreover, in arguing that the terms of the *ketubah* were indefinite, the dissent claimed that "the trial court's order . . . c[ould] not be distinguished from the court making a contract for the parties."[163]

Were *Goldman* and *Avitzur* correctly decided? Was the boundary between church and state breached by requiring the husbands to give a *get* and appear before a *beth din*, respectively? Did either court inquire into religious doctrine or polity beyond the permissible limits?

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158. *In re Marriage of Goldman*, 554 N.E.2d at 1023 (citing Avitzur v. Avitzur, 446 N.E.2d 136 (1983)).

159. *Id.* at 1023. Presumably, the court intended this quote to mean that Kenneth had a strong dislike of Orthodox Judaism, but his feelings did not derive from a religious basis—instead, the court seems to have concluded that his feelings had a more general or political basis. It is still interesting that the court used the verb "rise" and the term "level" thereby suggesting that religious beliefs are somehow above all other beliefs. Perhaps, however, the court simply meant that religious beliefs "rise" above the masses of other beliefs in that religious beliefs are given specialized protection under the religion clauses of the First Amendment.

160. *Id.* at 1023–24. The court also considered whether Kenneth's rights under the Illinois Constitution's religion clause were violated, but held that they were not, because Kenneth had not shown the clause to provide any additional or different protection from the First Amendment. *Id.* at 1024.

161. *Id.* at 1025–26 (Johnson, J., dissenting).

162. *Id.* at 1026 (Johnson, J., dissenting).

163. *Id.* (Johnson, J., dissenting).

When pursuing these questions, it is clear that reasonable minds may differ somewhat in their individual analyses. Nevertheless, those who are disturbed by the *Goldman* and *Avitzur* rulings should recognize that such cases are far from the most extreme examples. In *Kaplinsky v. Kaplinsky*, for example, a New York appellate court upheld a contempt order's penalty of *imprisonment* imposed on a husband for failing to give his wife a *get*.[164] Other courts have held the same,[165] and still other courts have demonstrated an overt willingness to engage in religious inquiry. For instance, in *Minkin v. Minkin*, a New Jersey court "*on its own motion* requested the testimony of several distinguished rabbis well versed in Jewish law" to determine, based on their analysis of religious law, if enforcing a disputed *ketubah* would violate the Establishment Clause.[166] Analogous expert testimony has been sought

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164. Kaplinsky v. Kaplinsky, 603 N.Y.S.2d 574, 575 (N.Y. App. Div. 1993).

165. *See* Fischer v. Fischer, 655 N.Y.S.2d 630, 631 (N.Y. App. Div. 1997) (stating that a husband could be imprisoned because "he failed to voluntarily give the [agreed upon] 'get' and he failed to set up a payment schedule for the continuously mounting arrears"); Megibow v. Megibow, 612 N.Y.S.2d 758, 760 (N.Y. Sup. Ct. 1994) ("Plaintiff's failure to cooperate in [giving his wife a *get*] may result in punishment for contempt."); *cf.* Sieger v. Sieger, 806 N.Y.S.2d 448 (N.Y. Sup. Ct. 2005) (unpublished table decision) (discussing the interaction of a *Heter* and a *get* in the context of a complex dissolution, and making the seemingly contradictory conclusions that: (1) "having determined that the court 'cannot restrict the religious and quasi-religious actions of one of the parties,' it follows that the court cannot punish a party, economically or otherwise, for having obtained a religious divorce" and yet (2) "that defendant is not without relief in the event that plaintiff refuses to provide her with an affidavit that he will remove all barriers to her remarriage or refuses to give her a Get prior to the entry of judgment of divorce. In this regard, it is clear that the court has the authority to compel a breaching party to comply by use of fines, the withholding of civil economic relief, a finding of contempt and/or imposing a term of imprisonment . . . ." (citations omitted)), *aff'd in part and modified in part*, 829 N.Y.S.2d 649 (N.Y. App. Div. 2007). *But see* Aflalo v. Aflalo, 685 A.2d 523, 530 (N.J. Super. Ct. Ch. Div. 1996) (refusing to compel a husband to give his wife a *get* and noting that enforcement would be unpalatable: "The spectre of [the husband in this case] being imprisoned or surrendering his religious freedoms because of action by a civil court is the very image which gave rise to the First Amendment.").

166. Minkin v. Minkin, 434 A.2d 665, 667 (N.J. Super. Ct. Ch. Div. 1981) (emphasis added). The defendant husband also presented a rabbi's testimony.

in other cases as well.[167] Moreover, in the commercial case *National Group for Communications & Computers v. Lucent Technologies International*, a federal district judge endeavored to apply the law of Saudi Arabia—a "system [that] is governed exclusively by what is known as the 'Shari'a,' or *divine law* . . . derived primarily from the Qur'an"—by, among other things, "carefully consider[ing] the . . . testimony and submissions from . . . Islamic scholars."[168] Thus, if *Avitzur* and *Goldman* were deemed to have gone too far in compelling participation in religious acts or inquiring too deeply into religious law, these additional decisions would seem to be beyond the pale.

Just as there are wide variations in the types of religious contract cases, there is also diversity in enforcement mechanisms. While some courts have directly required the party or parties to do the thing specified in the contract,[169] other courts have taken a less direct approach, deliberately eschewing orders of specific performance. For instance, in *Rubin v. Rubin*, a wife who had agreed to

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Id. at 668. Ultimately, the court concluded, based on the testimony of the four rabbis the court summoned, that "acquisition of a get is not a religious act." *Id.* In doing so, the court rejected the testimony to the contrary from defendant's expert in part because defendant's rabbi testified that the other rabbis were "far better Jewish scholar[s] than myself." *Id.*

167. *See, e.g.*, Akileh v. Elchahal, 666 So. 2d 246, 247 (Fla. Dist. Ct. App. 1996) (involving testimony from family, the parties, and Islamic experts on the meaning of an Islamic marriage agreement).

168. Nat'l Grp. for Commc'ns & Computers v. Lucent Techs. Int'l, 331 F. Supp. 2d 290, 294–95 (emphasis added). Whether or not the judge's careful scrutiny and application of divine law in this case was constitutional, his diligence was at least commendable. Some commentators have strongly criticized the *Lucent* decision. *See, e.g.*, Charles P. Trumbull, Note, *Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts*, 59 VAND. L. REV. 609, 635–36 (2006) ("The judge's resolution of this contract dispute violated the First Amendment. In applying Saudi law (and thus Islamic law) to determine the parties' rights under the contract, the judge had to conduct an extensive inquiry [into] Islamic law and make an independent determination of religious doctrine: the precise scope of the prohibition of gharar. The judge could not rely on secular tools to make this determination because Saudi law is not codified and judicial decisions are not reported. Rather, the judge took on the role of a Muslim qadi, rejecting the plaintiff's argument because it lacked 'supporting religious authority.'" (footnotes omitted)).

169. *See, e.g.*, In re Marriage of Goldman, 554 N.E.2d 1016, 1020–21 (Ill. App. Ct. 1990).

assist in receiving a *get*—but had not actually done so—asked the court to nevertheless order the husband to pay her certain sums under their agreement.[170] However, because the parties agreed to the payment of those sums only if the wife cooperated in receiving a *get*, the court held that the failure of the wife to cooperate in the giving of a *get* was the failure of a condition precedent.[171] Instead of ordering the wife to cooperate in receiving a *get*, an allegedly religious act, the court instead concluded that until the wife cooperated she would not receive the benefits conditioned upon that cooperation.[172] Similarly, in *Bloch v. Bloch*,[173] an appellate court approved a trial court's order that "reserve[d] jurisdiction to reconsider and re-compute the Equitable Distribution, Alimony, Child Support and other economic provisions of [the court's] Judgment" if the husband did not "initiate and cooperate in the obtaining of a [*get*]."[174] The trial court's order carefully noted that the husband "specifically is NOT Ordered" to actually obtain a *get*.[175] Thus, once again, a court avoided directly ordering an allegedly religious act while simultaneously recognizing that the nonoccurrence of that act would have secular and potentially important consequences for one or both parties.

Yet, just as some courts have enforced religious agreements, so too have others refused to do so. In *Aflalo v. Aflalo*, a New Jersey court declined to follow the decision in *Minkin*[176] and held instead that it could not compel a husband to give his wife a *get*.[177] The court in *Aflalo* specifically rejected the notion of sifting through conflicting testimony from rabbis, as was done in *Minkin*, suggesting that doing so would constitute "becoming an arbiter of

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170. Rubin v. Rubin, 348 N.Y.S.2d 61, 63–64 (N.Y. Fam. Ct. 1973).

171. *Id.* at 67 ("[T]his court is not called upon to enforce this religious discipline against a recalcitrant party, but, rather, is being called upon by the *Defaulting* party to enforce other relief in her favor at a time when she refuses to perform a condition precedent thereto, which happens to be an act of religious significance.").

172. *Id.* at 68.

173. 688 So. 2d 945 (Fla. Dist. Ct. App. 1997).

174. *Id.* at 946 (quoting the trial court's order).

175. *Id.*

176. *See supra* discussion accompanying note 166.

177. Aflalo v. Aflalo, 685 A.2d 523, 528–30 (N.J. Super. Ct. Ch. Div. 1996).

what is 'religious'" and "interpret[ing] religious law or canons."[178] The court also emphasized that "[n]o matter how one semantically phrases [requiring a husband to give his wife a *get*], the order directly affect[s] the religious beliefs of the parties."[179] Some commentators have agreed with this result, arguing that religious marriage contracts cannot be enforced for these very reasons.[180] Courts have likewise refused to receive expert testimony on matters they considered religious.[181] Moreover, at least one court has held that religious marriage contracts cannot be enforced at all,[182] while still others have refused to enforce religious agreements

178. *Id.* at 528–29.

179. *Id.* at 529 ("In one's pursuit to comply with the creator's will one is certainly engaged in religious activity.").

180. *See infra* Part VI; *see also* Blenkhorn, *supra* note 15, at 216 (arguing that, among other problems, Islamic marriage contracts require making a determination of what terms are secular which "is impermissible because this determination by itself rests upon judicial evaluation of Islamic doctrinal issues"); Trumbull, *supra* note 168, at 612 ("This Note argues that the First Amendment limits courts' ability to interpret contracts that contain Islamic legal terms or stipulate that Islamic law governs the performance of the contract."). *But see* Greenawalt, *supra* note 9, at 816–22, 839 (rejecting the argument that enforcement of Jewish marriage contracts is categorically unconstitutional); Warmflash, *supra* note 9, at 253 (agreeing with the approach in *Avitzur* as constitutional).

181. *See, e.g.*, Sieger v. Sieger, 747 N.Y.S.2d 102, 105 (N.Y. App. Div. 2002) ("To permit a party to introduce evidence or offer experts to dispute an interpretation or application of religious requirements would place [the court] in the inappropriate role of deciding whether religious law has been violated. Here, the appellant seeks to do precisely that by relying on the affidavit of Rabbi Rabinowitz to support his claim that the engagement contract required the husband to submit to arbitration before a rabbinical court." (citations omitted) (internal quotation marks omitted)).

182. *See* Pal v. Pal, 356 N.Y.S.2d 672, 672–73 (N.Y. App. Div. 1974) (reversing a detailed order requiring the parties to appear before a *beth din* and taking initial steps to convene the *beth din* because "Special Term had no authority to, in effect, convene a rabbinical tribunal"); *cf.* Margulies v. Margulies, 344 N.Y.S.2d 482, 484 (N.Y. App. Div. 1973) (refusing to uphold a contempt order of imprisonment stemming from a husband's refusal to provide a *get*, but upholding fines for the same because defendant did not appeal those orders); *id.* at 485 (Nunez, J., dissenting) ("The original order directing the plaintiff to obtain the religious divorce being improper, the subsequent orders did not validate it. I am certain my brethren would not enforce an order directing a litigant to go to confession or to say six Our Fathers and four Hail Marys. I would reverse and deny the motion to punish.").

based on a hybrid blend of First Amendment concerns and statutory or judicial restraint concepts.[183]

Yet, even among these diverse approaches, there exists a central line highlighting the possibility of resolution via neutral principles of law. That is, by applying the well-known maxims of contract law, courts may even adjudicate some matters that expressly invoke religious topics and concerns. For example, in *Goldman*, the court expressly relied on contract principles to resolve the dispute.[184] Similarly, in *Akileh v. Elchahal*, a Florida appellate court looked to contract principles in analyzing an Islamic marriage contract.[185] However, the availability of neutral principles of contract law does not necessarily mean that all religious agreements are enforceable. In *Victor v. Victor*, an Arizona appellate court refused to enforce "law of Moses and Israel" language, regarding it as "a vague provision [that] ha[d] no specific terms describing a mutual understanding that husband would secure a Jewish divorce."[186] Thus, the availability of neutral principles of contract law suffices only to help avoid Establishment Clause violations; the agreements involved might still be deemed unenforceable under those neutral contract law principles.

Finally, courts have also frequently confronted the question of how far into religious doctrine they can peer without violating the Establishment Clause and the Free Exercise Clause. This ques-

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183. *See, e.g.*, Turner v. Turner, 192 So. 2d 787, 788–89 (Fla. Dist. Ct. App. 1966) (holding that a trial judge "had no authority to order the appellee to participate in a religious ceremony" but also stating that the court "ha[d] not considered the appellee's contentions that requiring him to participate in a religious ceremony is a violation of his civil rights and the principle of the separation of church and state"); *see also* Victor v. Victor, 866 P.2d 899, 901 (Ariz. Ct. App. 1993) ("We find nothing in our statutes that gives the trial court authority to order a husband to grant a religious divorce document based on equitable considerations; the religious divorce is not germane to the civil dissolution.").

184. *In re* Marriage of Goldman, 554 N.E.2d 1016 *passim* (Ill. App. Ct. 1990).

185. Akileh v. Elchahal, 666 So. 2d 246, 248, 249 (Fla. Dist. Ct. App. 1996) ("The trial court erred in finding that the wife gave no consideration in this contract . . . . A subsequent difference as to the construction of the contract does not affect the validity of the contract or indicate the minds of the parties did not meet with respect thereto . . . . The husband's subjective intent at the time he entered into the agreement is not material in construing the contract.").

186. *Victor*, 866 P.2d at 902.

tion has arisen in a wide variety of contexts under both clauses of the First Amendment, including cases addressing sexual assaults by priests,[187] religious defamation,[188] breaches of a fiduciary duty,[189] and employment disputes,[190] among others. Courts have often disagreed in determining when an inquiry is too great. For example, some have concluded that inquiry is unconstitutionally excessive when undertaken to develop a required "deep understanding of [religious] practices and traditions."[191] Additionally, courts have held that "permit[ting] a party to introduce evidence or offer experts to dispute an interpretation or application of religious requirements . . . place[s] fact-finders in the inappropriate role of deciding whether religious law has been violated."[192]

On the opposite end of the spectrum, several courts have held that traditional fact-finding inquiries are permissible.[193] In *Elmora Hebrew Center, Inc. v. Fisher*, the New Jersey Supreme Court gave an example of such an inquiry. The court stated that while "only a religious authority may be able to decide the scope of duties of an 'orthodox Rabbi' . . . a civil court can certainly determine the term of a contract or non-religious conditions of employment [for such a Rabbi]."[194]

Other courts have addressed inquiry into religious doctrine itself. In *McKelvey v. Pierce*, the court held that "[t]he First Amendment is not violated so long as resolution of a claim does not require the court to choose between competing interpretations of religious tenets or to interfere with a church's autonomy rights."[195] Setting out a similar rule in the context of the Free Ex-

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187. *See* Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409, 430 (2d Cir. 1999); Malicki v. Doe, 814 So. 2d 347, 353 (Fla. 2002); McKelvey v. Pierce, 800 A.2d 840, 847–48 (N.J. 2002).

188. *See, e.g.*, Abdelhak v. Jewish Press Inc., 985 A.2d 197, 204–05 (N.J. Super. Ct. App. Div. 2009).

189. *See, e.g.*, Lightman v. Flaum, 761 N.E.2d 1027 (N.Y. 2001).

190. *See, e.g.*, Elmora Hebrew Ctr., Inc. v. Fishman, 593 A.2d 725, 727–29 (N.J. 1991).

191. *See Abdelhak*, 985 A.2d at 207–08.

192. *See Lightman*, 761 N.E.2d at 1033.

193. The New Jersey courts have been particularly active in this category of cases.

194. *Elmora*, 593 A.2d at 732.

195. McKelvey v. Pierce, 800 A.2d 840, 857 (N.J. 2002).

ercise Clause, the Second Circuit compared its standard to the hearsay rule:

> To the extent that the jury did consider religious teachings and tenets, moreover, it did so to determine not their validity but whether, as a matter of fact, Martinelli's following of the teachings and belief in the tenets gave rise to a fiduciary relationship between Martinelli and the Diocese. . . . The obvious distinction between the proper use of religious principles as facts and an improper decision that religious principles are true or false bears a certain family resemblance to the more mundane rules of hearsay. Evidence of a statement made out of court may be inadmissible as hearsay to prove the truth of the facts asserted in it, but may be admissible for the non-hearsay purposes of proving that the statement was made or that other facts can be inferred from the making of the statement. Similarly, the proposition advanced by a particular religion that "a bishop is like a 'shepherd' to the 'flock' of parishioners" cannot be considered by a jury to assess its truth or validity or the extent of its divine approval or authority, but may be considered by the same jury to determine the character of the relationship between a parishioner and his or her bishop.[196]

Echoing such sentiment, the New Jersey Supreme Court suggested a similar rule in dicta in *State v. J.G.* by specifically noting that a court could "consider a proffer of evidence about religious practices that are relevant to the particular interaction between the cleric and penitent."[197] It suggested:

> To the extent that the proffer bears on the penitent's objectively reasonable belief, the evidence should not be foreclosed. Thus, for example, if relevant to

196. Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409, 431 (2d Cir. 1999) (citations omitted).

197. State v. J.G., 990 A.2d 1122, 1133 (N.J. 2010) (dicta).

> determine a penitent's objectively reasonable belief, it would not be improper to consider basic background information about the practice of going on the Hajj, a pilgrimage to Mecca, so long as a court did not attempt to decide whether that practice constituted a doctrinal tenet of Islam.[198]

Thus, while the First Amendment may bar "'extensive inquiry' into religious law and polity,"[199] courts have come to a variety of conclusions when wrestling with religious document cases.[200] Although many courts have concluded that religious agreements can be enforced, not all have. Further, while some courts have applied the neutral principles analysis from *Jones*, there is meaningful variation in approach from case-to-case. Of course, there is also continued disagreement on the exact border between a permissible and an unconstitutional inquiry into religion.

These many cases arising in various contexts and pursuing different analytical methods highlight the difficulty in adopting a broad model for all religious documents. However, the development of a comprehensive framework remains both a possible and worthwhile endeavor. In pursuing that task it is also valuable to consider the analyses that other commentators have provided as to interpreting and enforcing religious documents. It is that scholarship which Part V now considers.

V. RELIGIOUS DOCUMENTS IN SECONDARY SOURCES

Religious documents have been the subject of occasional comment in law reviews and other secondary sources, particularly since *Jones* was decided in 1979. Just as there is variation in the

198. *Id.* (citation omitted)

199. Malicki v. Doe, 814 So. 2d 347, 363 (Fla. 2002).

200. *See* Victor v. Victor, 866 P.2d 899 (Ariz. Ct. App. 1993) (considering a *ketubah*); *In re* Marriage of Shaban, 105 Cal. Rptr. 2d 863 (Cal. Ct. App. 2001) (addressing an Islamic marriage contract); Scholl v. Scholl, 621 A.2d 808 (Del. Fam. Ct. 1992) (addressing a request to compel a *get*); Akileh v. Elchahal, 666 So. 2d 246 (Fla. Dist. Ct. App. 1996) (considering a *sadaq*); *In re* Marriage of Goldman, 554 N.E.2d 1016 (Ill. App. Ct. 1990) (considering a *ketubah*). The issue also arises outside the United States. *See, e.g.*, Kaddoura v. Hammoud, 168 D.L.R. 4th 503 (Can. Ont. Ct. J. 1998) (addressing an Islamic marriage contract).

cases themselves, there is also diversity in the secondary sources discussing those cases. Commentators have argued variously that religious agreements generally cannot be enforced, that they can be enforced only within narrow channels, or that they can and should be broadly enforced.[201] The literature itself raises the analysis of religious documents in a variety of settings, including church property cases,[202] the enforcement of Islamic marriage contracts,[203] the enforcement of Jewish marriage contracts,[204] agreements on a child's religious upbringing,[205] employment law contexts,[206] and agreements in other commercial contexts.[207] Some commentators have endorsed a neutral principles of law approach for religious contracts,[208] while others have rejected such a model.[209] Still oth-

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201. *Compare* Blenkhorn, *supra* note 15 (arguing courts cannot enforce religious agreements), *with* Trumbull, *supra* note 168, at 641 (arguing that courts can enforce agreements but that "[i]n order to satisfy the competing interests of abiding by the First Amendment and providing a forum for relief, judges should infer an arbitration clause into Islamic contracts in order to give full effect to the intent of the parties").

202. *See, e.g.*, Daniel R. Suhr, *On the Freedom of a Congregation: Legal Considerations when Lutherans Look to Change Denominational Affiliation*, 13 TEX. REV. L. & POL. 365 (2009).

203. *See, e.g.*, Siddiqui, *supra* note 15; Thompson & Yunus, *supra* note 17

204. *See, e.g.*, Wexler, *supra* note 9.

205. *See* Korzec, *supra* note 5; Jocelyn E. Strauber, Note, *A Deal Is a Deal: Antenuptial Agreements Regarding the Religious Upbringing of Children Should Be Enforceable*, 47 DUKE L.J. 971 (1998).

206. *See, e.g.*, David J. Overstreet, Note, *Does the Bible Preempt Contract Law?: A Critical Examination of Judicial Reluctance to Adjudicate a Cleric's Breach of Employment Contract Claim Against a Religious Organization*, 81 MINN. L. REV. 263 (1996).

207. *Cf.* Grossman, *supra* note 2.

208. *See* Barshay, *supra* note 9, at 225, 252 ("*Avitzur* unquestionably established that the neutral principles of law approach to the enforcement of Jewish marriage contracts is the constitutionally appropriate and viable standard for review."); Overstreet, *supra* note 206, at 292 ("By adopting a neutral principles approach, courts can resolve the secular questions a contract claim raises and still avoid any religious controversies over 'questions of religious doctrine, polity, and practice.'" (footnote omitted)); Siddiqui, *supra* note 15, at 650 (endorsing the contractual approach taken in Odatalla v. Odatalla, 810 A.2d 93 (N.J. Super. Ct. Ch. Div. 2002)); Strauber, *supra* note 205, at 1001 ("[A] court is not constitutionally prohibited from resolving [a religious] dispute, if it can use neutral principles of contract law to do so.").

ers have adopted a version of neutral principles but distinguished it from the test in *Jones*.[210] Similarly, commentators have disagreed about which acts are religious and which are not,[211] and about how far courts may inquire into religious matters when interpreting religious agreements.[212] By considering these points of disagreement, a stronger foundation for the model proposed in Part VI can be developed.

As with the types of cases that have arisen in state and federal courts, two commonly discussed contexts within the literature for religious documents are church property cases and cases concerning marriage contracts. Especially as to the latter, commentators have noted the various and unfortunate harms that have re-

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209. *Cf.* Blenkhorn, *supra* note 15, at 217 ("Moreover, civil courts cannot apply neutral principles of law in deducing the couple's intent in a document that is inherently religious. The obligation by the husband to pay the *mahr* is a religious duty, addressed in the Shari'a and required by the Qur'an . . . . [E]nforcement of a religious marriage contract necessarily requires reference to substantive religious and ecclesiastical law, especially where there is a dispute as to which of the numerous legal or religious schools apply." (footnotes omitted)).

210. *See* Louis J. Sirico, Jr., *Church Property Disputes: Churches as Secular and Alien Institutions*, 55 FORDHAM L. REV. 335, 357–58 (1986) (proposing a "secular documents test" that "differs from the neutral principles test in that it . . . refuses to consider provisions in church documents, such as church constitutions and canons, except . . . if the legal document incorporates the provision by reference and it is not so general or ambiguous that its consideration defeats the purpose of having a very narrow test").

211. *Compare* Greenberg-Kobrin, *supra* note 17, at 383 (arguing that "even if there is judicial coercion to appear before a *Beit Din* or to grant a *get*, the required act is secular and thus, outside the scope of the Establishment Clause"), *with* Marc Feldman, *Jewish Women and Secular Courts: Helping a Jewish Woman Obtain a* Get, 5 BERKELEY WOMEN'S L.J. 139, 153–55 (1990) ("[T]he giving of a *get* should be regarded as a religious act.") *and* Paul Finkelman, *A Bad Marriage: Jewish Divorce and the First Amendment*, 2 CARDOZO WOMEN'S L.J. 131, 165–66 (1995) ("If it looks like a duck, quacks like a duck, flies like a duck, swims like a duck, and walks like a duck, then it must be a duck. When we apply the 'duck test' to the *get*, this 'duck' appears to be a religious one.").

212. *Compare* Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1888 (1998), *and* Greenawalt, *supra* note 9, at 821, *with* Blenkhorn, *supra* note 15, at 216.

sulted from non-enforcement of religious agreements.[213] In general, there is fairly broad agreement that it is desirable to enforce religious contracts when it can be done without violating the First Amendment or running afoul of basic principles of contract law. This result is not surprising; just as religious parties have a right to contract, courts should enforce those contracts where the law does not otherwise prevent them from doing so.[214]

There is, however, fairly broad disagreement on the details of adjudication. One of the most divisive issues for commentators has been the question of how far courts may inquire into religious doctrine to interpret the agreement at issue. Some commentators, such as Kent Greenawalt, have argued that generally "courts cannot both avoid resolving religious questions and give effect to all the expectations of those deeply involved in religious organizations."[215] In other words, if a court is seeking to learn the parties' intent manifested in a contract, then there is a necessary tension between the court's looking into documents and matters evidencing that intent and the Establishment Clause's limit restricting where the court may peer. To help resolve this conflict, Greenawalt argues that "[c]ourts should be able to look at any documents, so long as they can interpret crucial passages in the appropriate way."[216] Greenawalt suggests that courts should be able to interpret terms "even if they must make some reference to religious law" to do so.[217] Greenawalt notes importantly, however, that

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213. *See* Greenberg-Kobrin, *supra* note 17, at 368–69; Blenkhorn, *supra* note 15, at 189–90; Wexler, *supra* note 9, at 735–36; *cf.* Ghada G. Qaisi, Note, *Religious Marriage Contracts: Judicial Enforcement of Mahr Agreements in American Courts*, 15 J.L. & RELIGION 67, 78 ("In effect, a Muslim wife is denied her right to contract in jurisdictions where mahr agreements are considered profiteering by divorce.").

214. *See, e.g.*, Watson v. Jones, 80 U.S. 679, 714 (1871) ("Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints.").

215. Greenawalt, *supra* note 212, at 1905.

216. *Id.* at 1888.

217. Greenawalt, *supra* note 9, at 821.

courts still may not resolve doctrinal disputes under this approach.[218]

On the other side of the debate, commentators have argued that courts are broadly prohibited from inquiring into religious doctrine. For example, in addressing Islamic marriage contracts, Lindsey Blenkhorn argued that "even a determination of which terms in an Islamic marriage contract are secular and which are not is impermissible because this determination by itself rests upon judicial evaluation of Islamic doctrinal issues."[219] Additionally, Charles Trumbull has suggested that "[c]ourts may not enforce religious contracts when the contracting parties disagree on the meaning of a religious term, the application of religious law, or an issue of religious doctrine."[220] Some commentators have even concluded that "*Smith* [via its prohibition on judicial inquiry into the centrality of a religious belief within the religion] confirms that the prohibition against judicial examination of religious questions articulated in the church property cases should be understood to be broad and absolute."[221]

This broad reading, however, is troubling as it threatens to render documents with any religious language nonjusticiable. Because parties often enter into contracts to address matters of importance to them and religious matters are obviously important to religious entities, contracts between religious individuals or entities will often invoke religious language. Thus, a broad prohibition on inquiry and analysis of religious agreements would, by definition, undermine the contract rights of religious bodies. That result is

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218. *See, e.g.*, 2 GREENAWALT, *supra* note 83, at 274, 275 ("Civil determination of *debatable* issues of religious law is generally unacceptable . . . [b]ut recognition of religious law does not by itself render [] civil involvements unconstitutional.").

219. *See* Blenkhorn, *supra* note 15, at 216; *see also* Elizabeth R. Lieberman, Note, Avitzur v. Avitzur*: The Constitutional Implications of Judicially Enforcing Religious Agreements*, 33 CATH. U. L. REV. 219, 242 (1983) (arguing that *Avitzur* "failed to recognize that determinations regarding the legal significance of a religious document's provisions violate constitutional principles protecting against excessive entanglement by the government in religious doctrine").

220. *See* Trumbull, *supra* note 168, at 624–25.

221. Goldstein, *supra* note 119, at 519. Notably, Goldstein also argues that such a rule is undesirable and problematic.

undesirable to the extent that it is avoidable within the confines of the Establishment Clause.

In response, some commentators have suggested that the prohibition into inquiry should distinguish between deciding doctrinal questions—i.e., courts deciding what is "true" and what is "false" about religious beliefs objectively—and making factual observations—i.e., courts deciding what is believed to be true by adherents as a matter of proof. For example, Jared Goldstein explained the distinction, stating:

> [A] court may not determine whether food actually is ritually fit for consumption according to God's laws any more than it may determine whether Devil's Tower actually is a sacred site, but a court may constitutionally determine whether Jews *believe* the food to be kosher just as it could determine whether the Cheyenne people *consider* Devil's Tower to be sacred.[222]

Greenawalt has similarly argued:

> Suppose that someone sold crosses with the claim, "Personally Blessed by the Pope." The state may properly prevent such fraud. No doubt, some claims of religious fraud present grave problems. Officials cannot assess the truth of essentially religious claims, and they should ordinarily not determine the sincerity of people who make claims about their own religious experiences, such as "God has revealed himself to me." But a simple determination that the Pope did not bless particular crosses does not raise such problems . . . .[223]

Under these approaches, Goldstein has argued that "the resolution of Free Exercise Clause cases, like many others, depends on a court's determination of the content of religious beliefs and practices. Such determinations do not exceed judicial compe-

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222. *Id.* at 548.

223. Greenawalt, *supra* note 9, at 790 (footnote omitted).

tence and cannot plausibly be considered to be prohibited by the Constitution."[224] These commentators seem to be correct.[225] In other words, while there are some impermissible determinations and forbidden inquiries into religious matters, the prohibition is not without bounds. Courts may look—they may make observations about what is or was believed—but courts may not touch—they may not resolve disputes over or issue declarations regarding what is a true or false belief.[226] Similarly, a court could determine whether a particular person's stated religious belief or intent was sincerely held or was instead a façade to frustrate judicial enforcement of terms now unfavorable to that party.[227] The model proposed in Part VI draws upon these distinctions.

Turning to the matter of coercion, commentators generally agree that "[t]he state should not compel intrinsically religious acts, even if people have agreed to perform them."[228] After all, "if the First Amendment means anything, it means that the state may not force someone to subject himself or herself to religious authori-

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224. Goldstein, *supra* note 119, at 551.

225. *Smith*'s prohibition on determining whether a belief is "central" to a religion does not indicate otherwise. The prohibition in *Smith* is more analogous to resolving a doctrinal dispute than it is to a basic fact-finding inquiry. This Article does not dispute that courts cannot resolve doctrinal disputes.

226. Or as another commentator has phrased it, "on religious matters, courts may not tell people what they should do or believe, but they may determine, in the sense of making factual findings, what beliefs people hold and what practices they engage in." Goldstein, *supra* note 119, at 501. Stated more expansively, "The First Amendment is not violated so long as resolution of a claim does not require the court to choose between competing interpretations of religious tenets or to interfere with a church's autonomy rights." McKelvey v. Pierce, 800 A.2d 840, 857 (N.J. 2002).

227. For a commentator arguing such "sincerely held" inquiries are permissible, see Breitowitz, *supra* note 15, at 395–96 ("While no court may determine the ultimate truth or validity of a religious belief, the court may certainly conduct an inquiry into whether the alleged 'religious' objections are sincerely held, as is routinely done in cases of conscientious objectors to military service." (footnote omitted)).

228. Greenawalt, *supra* note 9 at 817; *see also* Finkelman, *supra* note 211, at 147 (responding to Breitowitz's article); *cf.* Bleich, *supra* note 32, at 277 ("It must be recognized that any attempt to involve secular courts in assuring that the parties to a divorce action will also cooperate in the execution of a religious divorce poses a serious constitutional problem.").

ties."[229] This is an important component of both existing Establishment Clause jurisprudence and of the model adopted in Part VI of this Article. Nevertheless, as was discussed previously, there is broad disagreement on which actions are religious and which are not. Consider the following perspective:

> Enforcement [of a *ketubah*] could be construed as judicial coercion of participation in religion, in violation of *Lee*. Such a conclusion would be tenuous, however, as courts would be simply enforcing an agreement to which the parties themselves have freely bargained. They are not required to take a position on religious questions. This position has the support of many scholars, who have argued that granting a *get* is not a "religious" act, but rather a contractual one. Therefore, even if there is judicial coercion to appear before a *Beit Din* or to grant a *get*, the required act is secular and thus, outside the scope of the Establishment Clause.[230]

On the other side of the spectrum, commentators have argued that simply appearing before a religious tribunal for a religious divorce is itself a religious act: "*any* appearance before a religious tribunal for the purpose of exercising a religious divorce is per se religious in nature. There is no secular justification for such a divorce since a civil divorce legally terminates the marriage."[231] Moreover, in light of the difficulties in both compelling a religious divorce and in granting a secular divorce *without* compelling a religious counterpart, other commentators have advised that courts should "do nothing" and thereby "remain neutral."[232] Under *Lee* and its prog-

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229. Finkelman, *supra* note 211, at 147 (responding to Breitowitz's article).

230. Greenberg-Kobrin, *supra* note 17, at 383 (footnotes omitted) ("Even if the agreement specifies a standing *Beit Din*, under *Lynch* and *Lee*, sending the parties to a religious court may be considered endorsement or coercion.").

231. *See* Lawrence C. Marshall, Comment, *The Religion Clauses and Compelled Religious Divorces: A Study in Marital and Constitutional Separations*, 80 NW. U. L. REV. 204, 219 (1985).

232. Bleich, *supra* note 32, at 281–82 ("The court need not direct the husband to issue a *get*; but it should not entertain his petition for divorce unless he

eny, coercion of a religious task is forbidden, and thus, it is essential for a court adjudicating religious agreements to first conclude whether the act involved is religious.

Yet, whether or not courts deem a given act to be religious, courts must always make more fundamental determinations concerning the existence of contractual agreements. Indeed, before any religious agreement can be enforced, a court must consider whether it was intended as a contract at all.[233] In the scholarly community, many commentators refuse to find religious documents as deserving of contractual status. Paul Finkelman has argued that "[i]t is a peculiar notion that a valid and binding contract is created when parties sign a ritualistic document, which they are incapable of either reading or understanding, and which no one reads to them or translates for them."[234] Moreover, because of certain religious beliefs or circumstances that surround the signing of religious agreements—such as cultural pressures and family members negotiating the terms of the contract for the signee—some have suggested that many parties sign religious documents under duress or without complete knowledge of the agreement.[235] Similarly, in reviewing the characteristics of Jewish marriage contracts, Marc Feldman noted the following:

> The *ketubah* contains exclusively boilerplate language and is, therefore, not reflective of the parties' intentions and expectations; it is not a contract negotiated at arm's length. Moreover, the reference to the *bet din*, while intended to deal with the event of divorce, does not explicitly mention dissolution, and so may not put a husband on notice of its intended

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has already removed any existing impediment to remarriage by his spouse or unless he undertakes to do so.").

233. *See, e.g.*, Feldman, *supra* note 211, at 147–48; *cf.* Carol Weisbrod, *Universals and Particulars: A Comment on Women's Human Rights and Religious Marriage Contracts*, 9 S. CAL. REV. L. & WOMEN'S STUD. 77, 89 (1999) (questioning, in the context of Article 16 of the Universal Declaration of Human Rights, whether religious marriage agreements are contractual agreements).

234. Finkelman, *supra* note 211, at 148.

235. *See, e.g.*, Blenkhorn, *supra* note 15, at 222–23 (suggesting that *mahr* agreements might often be signed under "duress or undue influence by the *wali* or some other cultural force").

> effect. The *ketubah* is also signed amidst a day of religious ceremonies and celebrations; it could be regarded as just part of the wedding celebration, with the parties not understanding its true significance.[236]

These commentators are correct in noting the difficulties in determining whether a religious agreement is enforceable as a contract and in inquiring into the circumstances surrounding the agreement's creation. These are questions that courts cannot ignore and that must be included in the model proposed in Part VI.

In summary, while it is clear that commentators have fallen on many sides of the religious document debate, the diversity of discussion empowers Part VI's framing of an analytical approach. In particular, the debate highlights problems that courts must be particularly aware of: (a) whether the document was ever intended to be a contract, (b) how far courts may inquire into religious doctrine, (c) whether enforcement of the agreement requires coercing a religious act, and (d) whether the document is invalid under principles of contract law. As each of these questions is important, the Article's proposed model takes each into account. It is to that model that the discussion now turns.

VI. INTERPRETING AND ENFORCING RELIGIOUS DOCUMENTS

Before outlining a proper framework for interpreting religious documents, it should be re-emphasized that religious individuals and groups have just as much right to have their agreements enforced—when possible—as any other contracting party.[237] Moreover, when a court fails to enforce a contract, it fails to protect one or both parties' expectations, thereby exposing the parties

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236. Feldman, *supra* note 211, at 147–48; *see also* Marshall, *supra* note 231, at 225 n.98 (discussing the *ketubah* at issue in *Avitzur* and whether it was a contract or not).

237. *See, e.g.*, Watson v. Jones, 80 U.S. 679, 714 (1871) ("Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints.").

to un-bargained for consequences.[238] At times, these consequences can be severe. For example, parties could be forced into expensive and unexpected litigation if an arbitration clause involving a religious tribunal is not enforced, and similarly, a divorcing couple might have its post-marital plans disrupted if their marriage contract references religious law. In another scenario, a church or other religious group might have its only property taken away if religious language describing the property's reversion status is denied interpretation.[239] However, even in the face of such unfortunate results, the First Amendment draws some lines that cannot be crossed. Some religious agreements will simply be unenforceable. As Justice Souter remarked, "[C]onstitutional lines have to be drawn, and on one side of every one of them is an otherwise sympathetic case that provokes impatience with the Constitution and with the line. But constitutional lines are the price of constitutional government."[240] In keeping with such forethought, the model below simply seeks to help courts locate those constitutional lines and chart a path of analysis and enforcement for those religious documents that are enforceable.

A. A Four-Step Proposed Analysis

The proposed model for interpreting religious documents consists of four steps, neatly dividing the analysis for ease of de-

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238. *See, e.g.*, Ellman, *supra* note 10, at 1383 ("The price of [non-enforcement] . . . is denying church members ordinarily available remedies, solely on account of the religious nature of the organization in which the . . . contract . . . dispute arose. When a court refuses to adjudicate church disputes, it may sacrifice members' contractual interests and religious freedom."); *see also id.* at 1402–05 (discussing why religious agreements should be enforced).

239. It is worth noting that harms could also result from *enforcement* of a religious contract. It is not an unfair response to state that many of the negative consequences just described stem not from any failure of the judicial system, but instead from the personal religious beliefs of the parties. *Cf.* Finkelman, *supra* note 211, at 134 ("The problem faced by the *agunah* is not one of civil law or even the interaction of civil law with religious law. The problem stems from Jewish law, which does not allow a woman to divorce her husband and does not allow a *bait din* to compel a Jewish man to divorce his wife, or to deliver a *get* to her, even if he has abandoned her.").

240. Zelman v. Simmons-Harris, 536 U.S. 639, 686 (2002) (Souter, J., dissenting) (quoting Agostini v. Felton, 521 U.S. 203, 254 (1997) (Souter, J., dissenting)).

scription and discussion. Nevertheless, it is not strictly necessary for a court to proceed from each stage in exact numerical succession. Instead, it is critical that the court keep all of the steps in mind during each stage.

1. Step One: Is There a Contract?

The first task for the court is to determine what the document is, and thus, the court's basic aim is to determine whether any contract exists in a case where the parties allege that a religious document constitutes one. It should be noted that this element of the analysis turns not on constitutional principles but rather on the law of contracts. Hence, the crux of the court's initial inquiry is the following: did the parties intend for this agreement to be a contract,[241] or did the parties intend for it to be enforced solely by ecclesiastical courts or perhaps not at all because they viewed it as simply art or poetry?[242] If the document was created as only art or poetry, or as something purely symbolic and not symbolizing an agreement to ideas and terms, the court could conclude it is not a contract and thus not enforce its terms. If, however, it is found that a contract is present, the court advances forward in the remaining three steps of the analysis. Throughout the process, the court should apply contract principles, and if at any point the agreement fails on such grounds—such as due to a lack of consideration or vagueness—the maxims of contract law and not constitutional law preclude enforcement.

2. Step Two: What Relief Is Sought?

The next task set before a court asked to enforce a religious contract is to identify the relief requested. Because the nature of the relief sought will significantly impact which portions of the religious agreement must be interpreted, identifying the relief is essential. For example, imagine that a Muslim wife is requesting the court to compel payment of a *mahr* by her husband, and yet, upon review, suppose the court observes that the *nikah* has a sepa-

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241. *See, e.g.*, Marshall, *supra* note 231 (raising this question).

242. *See, e.g.*, *In re* Marriage of Goldman, 554 N.E.2d 1016, 1020 (Ill. App. Ct. 1990) (involving a husband who argued that he viewed their religious marriage contract merely as art or poetry).

rate section in which the parties agreed to pray together after any marital dissolution. If the court concludes that enforcing the separate portion of the *nikah* requiring prayer is unconstitutional—and it surely is[243]—but the parties are not calling on the court to enforce that portion, then the invalidity of the prayer provision is not necessarily dispositive for the *mahr* provision. In such a situation, the court should conduct a traditional severability analysis and, if severable, strike the post-dissolution prayer provision. By concentrating on the provisions relevant to the requested relief, the court will place the case in the proper framework and avoid dismissing cases because they contain some non-relevant provision that itself could not be constitutionally enforced. Focusing on the requested relief is also important as it will limit any inquiry into religious law.

3. Step Three: Interpretation Limits

Once the court has identified the relief requested, it must interpret the provisions related to that relief. This stage does not neatly follow the prior stage because it will often be necessary in determining the requested relief—step two—to interpret the provisions from which that relief allegedly will derive—step three. In other words, it might be necessary to interpret certain terms in the agreement in order to determine what the requested relief entails.

In interpreting the provisions from which relief derives, there are two main possibilities. The first possibility is that the terms of the provisions are secular. For example, two parties might have contracted in non-religious terms for the provision of particular food at a religious event. If the terms are purely secular, then the court can simply read them directly. In such a circumstance, the court is done with this stage of the analysis and proceeds to the fourth and final step. For example, a contract stating that "all disputes between the parties will be submitted to arbitration by the Centre for Christian Dispute Resolution (CCDR), located at [a certain place]" is a provision that, at least in language, is secular.

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243. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Lee v. Weisman, 505 U.S. 577, 587 (1992). In both cases, subtly coercing individuals to pray was unconstitutional. A direct coercion from a court would be an even stronger violation than in these two cases.

For such a provision, the court can proceed to the next stage of the analysis.

The second possibility is that the terms in the provisions relevant to the requested relief are partially or wholly religious. For example, if the parties contracted that "only food that is Kosher under [a particular Jewish school's definition of that term] shall be served," then the court is faced with the question of what a particular religious entity believed a term to mean. Similarly, a provision stating that "the law of Moses and Israel" shall apply is specifically referring to religious law. This Article argues that such terms are often unenforceable under the Court's current jurisprudence to the extent they require resolving doctrinal disputes or making normative judgments.[244] Further, although some courts have done so,[245] inquiring into what "the law of Moses and Israel" requires in a given contract is at best dangerously close to the "extensive inquiry by civil courts into religious law and polity" that *Serbian Eastern Orthodox Diocese* forbids.[246] After all, determining something as expansive as what "the law of Moses and Israel" requires is likely to involve searching deeply into religious doctrine, as the term facially has no transparent meaning. Instead, its meaning comes only from *all* of the relevant portions of Moses's and Israel's law. Courts encountering such religious terms or concepts in the provisions relevant to relief must therefore proceed carefully. It is important, however, that a court not simply abandon ship when faced with religious language and assume that the possibility of some interpretation automatically precludes resolution of the case. The court has multiple potential tools to avoid that result.

If the contract provision at issue involves religious language requiring some inquiry into religious law, the court should take a two-pronged approach. First, it should focus as much as possible on inquiring not into what religious law provides but in-

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244. *See* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

245. *See, e.g.*, *In re Marriage of Goldman*, 554 N.E.2d at 1018 (upholding the enforcement of a Jewish marriage contract that provided that the "law of Moses and Israel" governed the marriage).

246. *Serbian E. Orthodox Diocese*, 426 U.S. at 709; *see also id.* at 723 ("The constitutional provisions of the American-Canadian Diocese were not so express that the civil courts could enforce them without engaging in a searching and therefore impermissible inquiry into church polity.").

stead into what the parties to the contract *intended* that provision—e.g., "the law of Moses and Israel" or "Kosher"—to mean.[247] As in *Goldman*, it may be the case that one of the parties will provide personal, uncontradicted testimony establishing what the parties had in mind when they agreed to that provision.[248] If the parties do so, the court might be able to determine what the parties intended the religious term to mean without approaching the outer boundaries of permissible inquiry. For example, the parties might introduce materials they reviewed in planning the event that contain detailed definitions of "Kosher." In such an instance, the court could strive to identify what the parties *intended* the term in their contract to mean without (a) declaring what the Jewish religious school actually believed "Kosher" meant, (b) resolving any doctrinal disputes about what "Kosher" as a religious term includes, or (c) extensively searching religious law itself. By focusing on the parties' intentions, the court can limit inquiry into religious doctrine, practice, or polity, and perhaps even avoid such inquiry entirely.

The second prong of a court's approach in interpreting religious terms arises if the first prong—looking to the parties' intentions—does not alone reveal the meaning of the religious term. Conceptually, the second prong is straightforward: to the extent that the court must inquire into religious law, it must limit its in-

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247. One possible result of this second stage of the analysis—interpreting the relevant provisions of the agreement—is that in investigating what the parties intended the terms of the contract to mean, the court will conclude that there was no meeting of the minds on the relevant term. To the extent that this result is problematic, that problem is a necessary result of treating the document at issue as a contract and applying contract principles to it. As the Supreme Court stated in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Church*, and repeated in *Jones v. Wolf*, "States, religious organizations, and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions." Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Church, 393 U.S. 440, 449 (1969).

248. It is debatable whether the wife in *Goldman* actually succeeded at this task, though on balance given the lack of contradictory evidence the husband apparently introduced, it seems that *Goldman* reached an accurate conclusion. Further, in *Goldman* some of the evidence the wife introduced required the court to consider religious law. *In re Marriage of Goldman*, 554 N.E.2d at 1018–20. Thus, *Goldman* is not a pure example of the first prong of this stage of the analysis.

quiry. While there are no bright-line rules in the case law for this portion of the analysis, it is true that the further a court restricts its inquiry, the less accurately it might determine the true intent behind the provision.[249] Thus, on one hand, it is clear that some inquiry is necessarily permissible. In *Jones*, the Court specifically noted,

> [T]here may be cases where the [document at issue] incorporates religious concepts in the provisions relating to the ownership of property. If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.[250]

The Court did not conclude, in this portion of *Jones*, that a court cannot inquire into religious concepts when a religious document incorporates them. Rather, it only foreclosed resolving doctrinal disputes. In addition, *Jones* did not state that the presence of such religious concepts tainted the entire interpretive process. Instead, the framework of *Jones* clearly suggested that some inquiry is constitutionally permissible.[251]

The Court's recent cases under *Lemon* also support the conclusion that basic fact-finding inquiries are constitutional insofar as they do not resolve doctrinal disputes. Indeed, because the Court itself has engaged in such basic fact-finding, this Article argues that basic religious inquiry is permissible. Moreover, once a court has determined what a relevant religious term means in the context of a document, the court should proceed to the fourth and final stage of the model. On the other hand, if a court cannot de-

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249. *See, e.g.*, 1 GREENAWALT, *supra* note 102, at 280 ("As the examination allowed under neutral principles becomes more restrictive, a court's actual inquiry will diverge further from a full inquiry about intent.").

250. Jones v. Wolf, 443 U.S. 595, 604 (1979) (citing *Serbian E. Orthodox Diocese*, 426 U.S. at 709).

251. As was noted previously, a court also must undertake some inquiry into religious law and polity to determine which hierarchical court it should defer to. *See* 2 GREENAWALT, *supra* note 83, at 264 & n.61; *cf.* Gen. Council of Fin. & Admin. v. Cal. Super. Ct., 439 U.S. 1369, 1372–74 (1978).

termine the meaning of a term after engaging in religious inquiry, the document at issue likely cannot be given full effect by the civil court.[252]

Despite the permissibility of religious inquiry, it is worth noting again that a court must not resolve any doctrinal disputes if the inquiry is to be valid.[253] For example, suppose that a *nikah* provision states that a wife may divorce her husband for a number of specified reasons (e.g., physical abuse, adultery) but also states that she may divorce him "for other reasons recognized by *Shari'a*." *Shari'a* is the divine law of Islam, and there are different schools of Islamic thought on what *Shari'a* entails,[254] each of which could have its own theories on when *Shari'a* permits a wife to divorce her husband. In light of such potential diversity, a court cannot authoritatively declare which school is correct in its interpretation of what *Shari'a* requires. Doing so would have a primary effect that advances the religious views of that school and inhibits the religious views of other schools, thereby failing the second prong of *Lemon* and suggesting an Establishment Clause violation.[255] A court would also be purporting to resolve a doctrinal dispute, a task forbidden in *Mary Elizabeth Blue Hull Memorial Church*.[256]

Instead, a court facing such a doctrinal dispute should seek only to determine what the parties intended to be "other reasons recognized by *Shari'a*." By determining only what the parties intended this term to mean, the court avoids resolving the *doctrinal* dispute (in the broader context of Islam) and instead resolves only the *parties'* dispute (in the narrow context of this one agree-

252. Some commentators have suggested that such contracts could still be enforced by referring them to a religious tribunal to determine the meaning of a term. *See, e.g.*, Trumbull, *supra* note 168, at 641–42.

253. *See, e.g.*, Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Church, 393 U.S. 440, 449 (1969).

254. *See, e.g.*, Blenkhorn, *supra* note 15, at 192 n.15 ("There are four main legal schools or sects within Islam: the Hanafi, Maliki, Shafi'i, and Hanbali. It should be stressed that there are many variations within the four schools as to interpretations and implementation of the Qur'an, and thus, it is difficult to generalize across many regions, tribes, and countries."); *see also* Siddiqui, *supra* note 15, at 644–45.

255. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

256. *Mary Elizabeth Blue Hull Mem'l Church*, 393 U.S. at 449.

ment).[257] It may be that the parties cannot produce evidence establishing what they intended, or it may be that the evidence is too indefinite and that the contract should fail under a vagueness analysis. On the other hand, it may be that, as in *Odatalla v. Odatalla* and *Goldman*, the parties will be able to provide testimony and other evidence indicating what the parties' intentions were under the agreement.[258] Again, if the parties cannot establish their intent, the contract might be unenforceable.[259] While unfortunate, that result is a contractual failing, and the court should not "mak[e] a contract for the parties."[260] If, however, the parties can supply evidence of intent, the court can avoid the constitutional prohibition on resolving doctrinal disputes by focusing instead on resolving the dispute over what the parties intended.

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257. *See, e.g.*, Ellman, *supra* note 10, at 1416 ("What the courts needed to decide in the synagogue cases was not the essence of Judaism, an unconstitutional if not impossible task, but rather the essence of the grantor's intent."); *cf.* Grossman, *supra* note 2, at 207 ("In the [arbitration] context, the reviewing court is searching only for an understanding of what the parties agreed to when they submitted a dispute before the religious tribunal. A court would not be making a determination of religious doctrine if it used extrinsic evidence, like testimony from the tribunal itself, family members, or whomever, that a party had a certain interpretation in mind. Thus, there is no pronouncement that applies across a particular religion. Moreover, even in the hard cases where a religious term is subject to wide dispute and susceptible to many interpretations within a particular religion, the courts may be able to take that as evidence that no valid agreement existed in the first place. In no sense does this type of review approximate a judicial determination of religious doctrine." (footnotes omitted)).

258. *See In re* Marriage of Goldman, 554 N.E.2d 1016, 1018 (Ill. App. Ct. 1990); Odatalla v. Odatalla, 810 A.2d 93 (N.J. Super. Ct. Ch. Div. 2002); *see also* Ellman, *supra* note 10, at 1420 ("Vagueness, however, is not a problem peculiar to church disputes; modern adjudications routinely look to extrinsic evidence to give vague terms the meaning necessary to decide a conflict.").

259. *See, e.g.*, Mayer-Kolker v. Kolker, 819 A.2d 17, 21 (N.J. Super. Ct. App. Div. 2003) ("Plaintiff has not established the effect of this particular *ketubah* nor the mandate of Mosaic law, if applicable. Without such a record we lack the necessary factual context to determine whether a New Jersey court has power to compel cooperation in obtaining a *get*.").

260. *In re Marriage of Goldman*, 554 N.E.2d at 1026 (Johnson, J., dissenting). Despite the general validity of the dissent's point in this regard, it is not clear that the majority in *Goldman* in fact made a contract for the parties.

4. Step Four: Coercion?

Once the court has identified the type of document present—stage one—identified the requested relief—stage two—and interpreted the provisions relevant to granting or denying relief—stage three—the court proceeds to the final stage of analyzing the agreement: determining if granting the relief itself is constitutional. In this stage, the court should focus on avoiding coercing religious exercises even if the document at issue is otherwise interpretable.[261] If the requested relief requires compelling a party to engage in a religious exercise, the relief simply cannot be granted. However, the parties are not the sole arbiters of what is religious. Likewise, unrefuted expert testimony from religious experts that an act is or is not religious would not itself necessitate a similar finding by the judge. The court must make that determination itself, just as it determines in any First Amendment case whether the beliefs or actions at hand are "religious" or not.

Thus, if an agreement calls for a husband to give to his wife a *get*, the court must determine if giving a *get* is a religious act. In doing so, it faces the same limitations discussed in the prior stages of this analysis. It may not delve too deeply into religious law, and it may not resolve any doctrinal disputes. Further, the court cannot compel performance of a religious act even if the contract calls for such. Contrary to what some courts and commentators have concluded, the fact that a party has previously agreed to perform a religious act should not cause a court to conclude that the limitations of the Establishment Clause simply disappear or are waived.[262]

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261. *Cf.* Goldstein, *supra* note 119, at 551 ("A court's authority to undertake fact-finding into positive questions about religion is thus a distinct question from its authority to impose remedies that may have the effect of inhibiting or promoting the exercise of religion.").

262. As other commentators have noted, the Establishment Clause appears to be a structural limitation on the government which an individual may not remove the burden of from the government. *See* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L REV. 1, 3 (1998) ("While individual rights can be waived, structural restraints cannot."); Kimberly A. Yuracko, *Education off the Grid: Constitutional Constraints on Homeschooling*, 96 CALIF. L. REV. 123, 153–54 (2008) ("The goals and benefits of the Establishment Clause are primarily social and structural, not individual. As such, individuals may not choose to waive the protections of the Establishment Clause."). Yuracko also notes Lawrence Tribe's argument that

Finally, even if the court cannot specifically enforce the contract, it might still be able to protect the parties' interests by other means. For example, the court might recognize that, though it could not order the performance of a contracted-for religious act, it could still recognize the non-performance as a contractual matter and refuse to give the corresponding provisions of the non-performing party's contract effect.[263] Or, if one party breached a contract requiring performance of a religious act—perhaps the singing of a sacred hymn at an event in exchange for a sum of money—the court should still be able to order the refund of the money paid for the unperformed act. In doing so, however, the court should not seek to use monetary or other sanctions as an indirect mechanism for forcing performance of the religious act. Rather, the court must merely endeavor to protect the interests created by the contract at issue. In summary, if the court reaches the fourth stage of the model and concludes that it can enforce the agreement without compelling any religious exercise and that its order will not otherwise violate the First Amendment, then the religious document can constitutionally be given legal effect.

"'it is plain that a church or church-related school could not, for example, "waive" the right to avoid intrusive governmental entanglement in order to receive direct monetary aid from the public treasury.'" *See id.* at 154 n.150 (quoting Laurence H. Tribe, Commentary, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 333 n.14 (1985)).

But notably some judges have concluded that Establishment Clause issues are at times effectively waived for procedural reasons. *See, e.g.*, Fleischer v. Fleischer, 586 So. 2d 1253, 1254 (Fla. Dist. Ct. App. 1991) (holding that an Establishment Clause argument was waived on appeal because it was not presented at the trial level and did not, under the facts of the case, rise to the level of fundamental error); *cf.* Warner v. Orange Cnty. Dept. of Probation, 115 F.3d 1068, 1077 (2d Cir. 1997) (Winter, J., dissenting) (arguing that consent to and failure to raise an alleged Establishment Clause violation was a waiver of the claim for damages suffered as a result of said violation).

263. *Cf.* Menorah Chapels at Millburn v. Needle, 899 A.2d 316, 321 (N.J. Super. Ct. App. Div. 2006) ("Although the services at issue may be required under the tenets of the orthodox Jewish faith [and therefore could not be coerced], the dispute does not concern the manner in which they were performed, but solely whether they were performed at all—a non-doctrinal matter.").

B. Scope of Proposed Analysis

The discussion surrounding this four-stage analysis has not addressed every possible permutation of a religious agreement, nor has it raised every nuance that courts will confront in interpreting religious contracts. Some cases will involve additional complexities because the parties allege that interpretation or enforcement of the document will cause Free Exercise Clause or expressive association violations.[264] Other cases might involve documents per-

264. Separate discussions of expressive association and the Free Exercise Clause are beyond the scope of this Article. Courts confronting claims under the Free Exercise Clause should begin with the two cases currently governing much of the jurisprudence: *Employment Division v. Smith*, 494 U.S. 872, 878–81 (1990), and *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). Under *Smith*, neutral laws of general applicability are constitutional despite incidentally burdening an individual's exercise of religion. *See Church of Lukumi Babalu Aye*, 508 U.S. at 531 (discussing *Smith*); *Smith*, 494 U.S. 872, 880–81. However, if the law is not in fact neutral or of general applicability but instead is directed at a particular religious group, then *Smith* does not apply. Instead, *Church of Lukumi Babalu Aye* applies and requires that the government demonstrate the constitutionality of the action in question. *See Church of Lukumi Babalu Aye*, 508 U.S. at 531–32. To do so, the government must prove that it has a compelling interest for the action and that the action is narrowly-tailored to serve that compelling interest. *Id.*

Likely, *Smith* will govern interpretation of a given religious contract, not *Church of Lukumi Babalu Aye*. In applying the *Jones* neutral principles of law approach, a court will necessarily be applying general legal concepts to resolve the dispute at hand. Jones v. Wolf, 443 U.S. 595, 602–03 (1979). The entire premise of the *Jones* analysis is that it looks to legal principles that apply broadly, and therefore, courts applying *Jones* should fit under *Smith*'s "law of general applicability" requirement. *Cf.* Meghaan Cecilia McElroy, Note, *Possession Is Nine Tenths of the Law: But Who Really Owns a Church's Property in the Wake of a Religious Split Within a Hierarchical Church?*, 50 WM. & MARY L. REV. 311, 337–38 (2008) ("The key component of the *Smith* test is the requirement that the law be neutral and of general applicability. This requirement goes hand-in-hand with the requirement in *Jones* that courts apply neutral principles of law." (footnote omitted)). For example, courts applying *Jones* to religious contracts would, if relying on contract principles, fall under *Smith*'s "valid and neutral law" requirement because general contract law axioms do not specifically target religion. Even if a court is applying contract law to address what is allegedly a religious harm—such as an *agunah* seeking referral to a *beth din* to remedy her inability to remarry within her faith—the legal principles applied are purely neutral, generally applicable contract principles. Accordingly, while religious document cases are somewhat different in form than *Smith*, they fit

taining to the internal structure of the church—potentially invoking the church autonomy doctrine—or to leaders of the religious group—potentially invoking the ministerial exception doctrine.[265] Still other cases might never find their way before secular courts if the parties decide to pursue them in religious tribunals.[266]

However, for those cases that do reach secular courts, the model proposed in this Article can help guide courts through a wide variety of religious document cases. Courts heeding the limitations set forth by the Supreme Court, described in Part III of this Article, and courts reviewing the on-point state and federal jurisprudence and legal commentary, discussed in Parts IV and V, will

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squarely within *Smith*'s "valid and neutral law of general applicability" standard, and thus *Smith* and *Lukumi* should be of little restricting force for courts in religious document cases. On the other hand, if a party is alleging that his or her free exercise rights are being violated because the court is coercing that party to engage in a religious act in fulfilling the contract then a valid free exercise claim has likely been made—and a prohibition on the court ordering performance of said act arises. In this limited instance, the Free Exercise Clause and the Establishment Clause operate in tandem to bar the court coercing performance of the religious act.

265. *See* Brady, *supra* note 105, at 1636 (arguing for a broad church autonomy doctrine founded in part on *Smith*); Laycock, *supra* note 87, at 1392; Marjorie A. Shields, Annotation, *Construction and Application of Church Autonomy Doctrine*, 123 A.L.R.5th 385 (2004); *cf.* Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952) ("Freedom to select the clergy . . . must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference."). *But see* McClure v. The Salvation Army, 460 F.2d 553, 560–61 (5th Cir. 1972) (discussing the ministerial exception); Laura S. Underkuffler, Commentary, *Thoughts on* Smith *and Religious-Group Autonomy*, 2004 B.Y.U. L. REV. 1773, 1776–81 (2004) (arguing that *Smith* applies to and contradicts the church autonomy doctrine).

266. *Cf.* Ginnine Fried, Comment, *The Collision of Church and State: A Primer to* Beth Din *Arbitration and the New York Secular Courts*, 31 FORDHAM URB. L.J. 633, 637 (2004) (observing that "choosing a secular court despite the availability of a Jewish court undermines the authority of Jewish law and the rabbinical courts, and what follows is the inference that the *beth din* lacks either the capability or sophistication to adjudicate an issue according to *halacha*. The great rabbinical authority Maimonedes captured this sentiment when he wrote that a Jew who voluntarily brings his case to secular court instead of utilizing the *beth din* has behaved 'as if he had raised his hand against the Torah.' Today, modern Jewish authorities still hold that '[a] central principle of *halacha* is that disputes between Jews should be adjudicated in duly-constituted rabbinical courts.'").

have at the ready even further guidance. Moreover, by focusing on the intentions of the parties at the micro-scale—as opposed to the broader religious issues at the macro-scale—courts may employ neutral principles of law to enforce some of even the most expressly religious agreements. Not all agreements will be enforceable, as non-enforcement will derive from instances of contractual failures, First Amendment prohibitions, or both. However, when possible, religious documents should be enforced. Religious parties are just like any other party that enters into agreements with expectations, and accordingly, those expectations are deserving of legal protection.

VII. CONCLUSION

While acknowledging that religious documents pose a number of constitutional concerns, this Article has suggested that religious documents very often can, and should, be enforced using neutral principles of law. Yet, while the analysis proposed herein is straightforward, it is not simple. Simplicity is rarely a friend of the nuanced Establishment Clause. The Supreme Court has specifically eschewed a universal analysis for all Establishment cases because such simplicity would fail to capture the relevant distinctions of the Clause. Another commentator has already well-described the dangers of simplicity in this regard:

> The aspiration for simple approaches is either deluded or badly misguided. It is deluded if a proponent believes simple approaches will yield results sensitive to the nuances of our religious and social life. It is misguided if a proponent recognizes the Procrustean quality of simple approaches, but thinks their clarity and determinacy are worth the price of unhappy outcomes.[267]

To some degree, therefore, results under the Establishment Clause for religious agreements are not certain. Ultimately, parties wishing to have their expectations protected will do better to draft a separate, secular agreement that is devoid of religious terms, that

267. Greenawalt, *supra* note 9, at 843.

complies with contractual principles, and that does not require performance of religious acts. However, this advice has already been suggested,[268] and religious documents still flourish. Given their continued existence, the above model proposes an analysis for protecting the expectations of religious parties in those documents when possible. While not all religious agreements will be enforceable, some will be. Hopefully, the proposed model will assist courts in identifying and enforcing those documents that do not run afoul of the Establishment Clause.

268. *See* Jones v. Wolf, 443 U.S. 595, 600 n.2 (1979).