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Catholic University Law Review

Volume 33
Issue 1 *Fall 1983*

Article 8

1983

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Elizabeth R. Lieberman, *Avitzur v. Avitzur: The Constitutional Implications of Judicially Enforcing Religious Agreements* , 33 Cath. U. L. Rev. 219 (1984).
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NOTES

AVITZUR V. AVITZUR: THE CONSTITUTIONAL IMPLICATIONS OF JUDICIALLY ENFORCING RELIGIOUS AGREEMENTS

The guarantees embodied in the first amendment's religion clause[1] reflect the Framers' concern that government should not interfere with religious belief or practice.[2] By ensuring government neutrality, the

1. The religion clause of the first amendment provides that: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof;" U.S. CONST. amend. I. For a general discussion of the religion clause, see Meek v. Pittenger, 421 U.S. 349 (1975); Sloan v. Lemon, 413 U.S. 825 (1973); Wisconsin v. Yoder, 406 U.S. 205 (1972); Cruz v. Beto, 405 U.S. 319 (1972); Epperson v. Arkansas, 393 U.S. 97 (1968); Engel v. Vitale, 370 U.S. 421 (1962); Shelton v. Tucker, 364 U.S. 479 (1960); Poulos v. New Hampshire, 345 U.S. 395 (1953); Kunz v. New York, 340 U.S. 290 (1951); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940).

Other guarantees in the first amendment include the freedom of speech and press, association, petition for redress of grievances, and assembly. This Note will be limited to a discussion of the religion clause and reference to the first amendment is solely to that clause. For further discussion of the other first amendment guarantees see Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (speech and press); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (speech and press); Cohen v. California, 403 U.S. 15 (1971) (speech and press); Bond v. Floyd, 385 U.S. 116 (1966) (speech and press); Cox v. Louisiana, 379 U.S. 536 (1965) (speech and press); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (speech and press); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (speech and press); Marchioro v. Chaney, 422 U.S. 191 (1979) (association); Baird v. State Bar of Ariz., 401 U.S. 1 (1971) (association); Williams v. Rhodes, 393 U.S. 23 (1968) (association); NAACP v. Alabama, 377 U.S. 288 (1964) (association); NAACP v. Button, 371 U.S. 415 (1963) (association); Shelton v. Tucker, 364 U.S. 479 (1960) (association); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967) (petition); Edwards v. South Carolina, 372 U.S. 229 (1963) (petition); Hague v. CIO, 307 U.S. 496 (1939) (assembly); Herndon v. Lowry, 301 U.S. 242 (1937) (assembly); De Jonge v. Oregon, 299 U.S. 353 (1937) (assembly). For a general discussion of the first amendment guarantees, see H. DRINKER, SOME OBSERVATIONS ON THE FOUR FREEDOMS OF THE FIRST AMENDMENT (1957); I. STARR, THE IDEA OF LIBERTY: FIRST AMENDMENT FREEDOMS (1978).

2. For a detailed historical outline of the events leading up to the ratification of the first amendment, see Engel v. Vitale, 370 U.S. 421, 427-28 (1962) (citing S. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA (1902); J. FISKE, THE CRITICAL PERIOD IN AMERICAN HISTORY (1899); C. JAMES, THE STRUGGLE FOR RELIGIOUS LIBERTY IN VIRGINIA (1900); W. SWEET, RELIGION IN COLONIAL AMERICA (1942); W. SWEET, THE STORY OF RELIGION IN AMERICA (1939)). For a further discussion of the events preceding enactment of the religion clause, see C. ANTIEAU, A. DOWNEY & E. ROBERTS, FREEDOM FROM FEDERAL

amendment protects against the power of the federal government controlling, supporting, or influencing an individual's religious beliefs.[3] Through the application of the due process clause of the fourteenth amendment, the Supreme Court secured the first amendment's protections against the states. This further guaranteed that neither the federal nor state governments would have the power to abridge religious freedom.[4] Judicial treatment of the first amendment's prohibitions has frequently distinguished the two clauses within the amendment: the establishment clause[5] and the free exercise clause.[6] Although both clauses protect the free exercise of religion by individuals and religious institutions, each achieves that end in a different manner. The focus of the establishment clause is protection against government sponsorship or aid of any one religion, or excessive

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ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGIOUS CLAUSES (1964); E. GOTTHELF, FREEDOM OF RELIGION (1941); L. PFEFFER, CHURCH, STATE & FREEDOM (1953); E. SMITH, RELIGIOUS LIBERTY IN THE UNITED STATES (1972); A. STOKES & L. PFEFFER, CHURCH & STATE IN THE UNITED STATES (Rev. ed. 1964); B. TIERNEY, RELIGION, LAW & THE GROWTH OF CONSTITUTIONAL THOUGHT, 1150-1650 (1982); Dahmus, *Henry IV of England: An Example of Royal Control of the Church in the Fifteenth Century*, 23 J. CHURCH & ST. 35 (1981); Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. PA. L. REV. 737 (1977); Pfeffer, *The Deity in American Constitutional History*, 23 J. CHURCH & ST. 215 (1981).

3. *Engel*, 370 U.S. at 429; *see* Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church (Hull Church), 393 U.S. 440 (1969); School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963); McGowan v. Maryland, 366 U.S. 420 (1961); Zorach v. Clauson, 343 U.S. 306 (1952); Everson v. Board of Educ., 330 U.S. 1 (1947).

4. *See, e.g.*, Engel v. Vitale, 370 U.S. 421, 430 (1962); Everson v. Board of Education, 330 U.S. 1, 15 (1947); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); *see also* Berger, *The Fourteenth Amendment: The Framers' Design*, 30 S.C.L. REV. 495 (1979); Note, *Constitutional Law—First Amendment—Establishment of Religion*, 43 TENN. L. REV. 147 (1975).

5. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971); Gillette v. United States, 401 U.S. 437 (1971); Presbyterian Church v. Hull Church, 393 U.S. 440 (1969); Engel v. Vitale, 370 U.S. 421 (1962); Torcaso v. Watkins, 367 U.S. 488 (1961); McGowan v. Maryland, 366 U.S. 420 (1961); Fowler v. Rhode Island, 345 U.S. 67 (1953); Zorach v. Clauson, 343 U.S. 306 (1952); McCollum v. Board of Educ., 333 U.S. 203 (1948); Everson v. Board of Educ., 330 U.S. 1 (1947); United States v. Ballard, 322 U.S. 78 (1944); Cantwell v. Connecticut, 310 U.S. 296 (1940); R. MILLER & R. FLOWERS, TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE AND THE SUPREME COURT (1977); Jones, *Church v. State & the Supreme Court: The Current Meaning of the Establishment Clause,* 5 OKLA. L. REV. 683 (1980); Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COLUM. L. REV. 1463 (1981). For a discussion of the establishment clause and free exercise clause, see *infra* note 76 and accompanying text.

6. *See, e.g.*, NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979); Wisconsin v. Yoder, 406 U.S. 205 (1972); School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963); Sherbert v. Verner, 374 U.S. 398 (1963); Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94 (1952); United States v. Ballard, 322 U.S. 78 (1944); Follett v. McCormick, 321 U.S. 573 (1944); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Note, *General Laws, Neutral Principles, and the Free Exercise Clause*, 33 VAND. L. REV. 149 (1980); *see also infra* note 76 and accompanying text.

entanglement by the government with religious doctrine.[7] In contrast, the free exercise clause assures that an individual will not be forced to participate in religious practice or forgo the exercise of his right of religious belief.[8]

The majority of the first amendment cases heard by the United States Supreme Court have pertained to intrachurch property disputes,[9] state statutes that directly or indirectly provide aid to religious organizations,[10] or efforts to conduct religious teaching in the public schools.[11] The Court has adopted different approaches to religion clause issues when interpreting the amendment as a prohibition against government intervention in religious doctrine and belief.[12] These approaches have included deferring to church polity,[13] testing the dispute against provisions of state law,[14] and weighing the religious and societal interests at stake.[15] Expanding upon the approaches followed by the Supreme Court, the state courts have attempted to apply these principles to religious disputes between private individuals.[16]

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7. *See supra* note 5 and accompanying text.

8. *See supra* note 6 and accompanying text. For a review of the complexities of and tensions between the clauses, see Gillette v. United States, 401 U.S. 437 (1971); Walz v. Tax Comm'n, 397 U.S. 664 (1970).

9. *See, e.g.*, Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Presbyterian Church v. Hull Church, 393 U.S. 440 (1969); *see also* Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CALIF. L. REV. 1378, 1380 n.4 (1980); Note, *Constitutional Guidelines for Civil Court Resolution of Property Disputes Arising From Religious Schism*, 45 MO. L. REV. 518 (1980).

10. *See, e.g.*, Committee for Public Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971); Walz v. Tax Comm'n, 397 U.S. 664 (1970); *see also* Note, *Educational Vouchers: Addressing the Establishment Clause Issue*, 11 Pac. L.J. 1061 (1980).

11. *See, e.g.*, Stone v. Graham, 449 U.S. 39 (1980); Epperson v. Arkansas, 393 U.S. 97 (1968); Engel v. Vitale, 370 U.S. 421 (1962).

12. *See infra* note 45 and accompanying text.

13. *See, e.g.*, Serbian Eastern Orthodox Diocese v. Milivojevich, 429 U.S. 696 (1976); Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, 396 U.S. 367 (1969); Presbyterian Church v. Hull Church, 393 U.S. 440 (1969). Deference to church polity generally is discussed in cases dealing with intrachurch property disputes. The Court has also referred, however, to the first amendment mandates requiring judicial nonintervention whenever resolution of a dispute turns on the interpretation of religious doctrine. *See* Jones v. Wolf, 443 U.S. 595 (1979).

14. *See Jones*, 443 U.S. at 595. Discussion of this approach, which evaluates property deeds and law, evolved from intrachurch property disputes.

15. *See Yoder*, 406 U.S. at 205. The balancing test generally is discussed where a government regulation in some way affects an individual's right of free exercise of belief; *see* United States v. Lee, 455 U.S. 252 (1982) (mandatory contribution to the federal social security system balanced against the religious beliefs of the individual). For a discussion of the balancing test in *Lee*, see *infra* note 71 and accompanying text.

16. *See, e.g.*, *In Re* Marriage of Hadeen, 27 Wash. App. 566, 619 P.2d 374 (1980) (cus-

Disputes between a husband and wife regarding the enforcement of a Jewish marriage document, the "Ketubah,"[17] or the breach of a promise to obtain a Jewish divorce, known as a "Get," have been addressed by the state courts.[18] Courts have focused on constitutional and contractual questions to determine whether the religious provisions of the Ketubah are immune from judicial construction or intervention, or if the Ketubah is a legally recognized antenuptial agreement.[19] By granting specific performance of a promise to obtain a religious divorce, the courts have raised questions pertaining to the applicability of first amendment guarantees regarding religious practice and belief that are not ordinarily present with enforcement of conventional secular agreements.[20]

The New York Court of Appeals in *Avitzur v. Avitzur*[21] was presented with the constitutional issues surrounding both the Ketubah and the Get. The couple in *Avitzur* signed a Ketubah as part of their religious wedding ceremony.[22] Following civil divorce proceedings twelve years later, the

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tody suit focused on mother's religious beliefs); Brillis v. Brillis, 4 N.Y.2d 125, 149 N.E.2d 510, 173 N.Y.S.2d 3 (1958) (action for annulment based on spouse's failure to fulfill promise to participate in a religious wedding ceremony).

17. *See* Minkin v. Minkin, 180 N.J. Super. 260, 434 A.2d 665 (Super. Ct. Ch. Div. 1981). The Ketubah is a document signed by a couple during a Jewish marriage ceremony. *See infra* note 22. *Rubin v. Rubin*, provides an explanation of the Ketubah derived from English translations of the Talmud, the Jewish ecclesiastical law originally written in Hebrew. 75 Misc. 2d 776, 779-81, 348 N.Y.S.2d 61, 64-66 (Fam. Ct. 1973). Briefly summarized, marriage under Talmudic Law is described as a contract, given validity by the continued contractual acts of the husband and wife. If the Ketubah, or marriage contract, ever leaves the actual or constructive possession of the wife, further cohabitation is forbidden. *Id.*

18. *See, e.g.*, *Minkin*, 180 N.J. Super. at 260, 434 A.2d at 665; *Rubin*, 75 Misc. 2d at 779-81, 348 N.Y.S.2d at 64-66. The Get was described in the Talmud as an act of release normally executed by the husband and delivered to the wife. The Bet Din, or rabbinical tribunal, which decided matters of traditional Jewish law, could also be convened by the wife; the wife would request the Bet Din to direct the husband to execute and deliver the Get. Once the tribunal authorized severance of the marriage relationship, the wife was free to remarry.

19. The performance of an antenuptial or prenuptial agreement is conditioned upon the occurrence of the marriage. Under law and public policy, the agreements are given the same presumption of validity and are construed according to the same principles that govern other contracts. The courts have liberally construed antenuptial agreements, giving effect to the intention of the parties. *See* Gillilan v. Gillilan, 406 N.E.2d 981, 988 (Ind. Ct. App. 1980); Matter of Sunshine, 51 A.D.2d 326, 381 N.Y.S.2d 260 (App. Div.), *aff'd*, 40 N.Y.2d 875, 357 N.E.2d 999, 389 N.Y.S.2d 344 (1976); 1 A. LINDEY, ON SEPARATION AGREEMENTS & ANTE-NUPTIAL CONTRACTS, § 270B (1982); Clark, *Antenuptial Contracts*, 50 U. COLO. L. REV. 141 (1979).

20. *See Rubin*, 75 Misc. 2d at 776, 348 N.Y.S.2d at 61 (promise to obtain a Get contained in separation agreement); Margulies v. Margulies, 42 A.D.2d 517, 344 N.Y.S.2d (App. Div. 1973) (promise to obtain a Get made by stipulation in open court).

21. 58 N.Y.2d 108, 446 N.E.2d 136, 459 N.Y.S.2d 572 (1983), *cert. denied*, 52 U.S.L.W. 3262 (U.S. Oct. 4, 1983) (No. 82-1854).

22. The Ketubah signed by the Avitzurs reads as follows:

wife commenced an action for specific performance of the provision in the Ketubah that required the husband to appear before the religious tribunal, the Bet Din, to obtain a Get. The wife could not remarry pursuant to Jewish law without the religious divorce.[23] The husband refused to appear before the Bet Din and filed a motion to dismiss. He claimed that resolution of the suit was prohibited by the first amendment because it would require the court to become excessively entangled in church doctrine.[24]

The Appellate Division for the New York Supreme Court overturned the special term's denial of the husband's motion to dismiss. It distinguished *Avitzur* from previous cases in which a promise to obtain a religious divorce had been incorporated into conventional civil agreements.[25] Justice Mahoney, writing for the majority, stated that the courts should not enforce a liturgical agreement,[26] and that the state, having already granted

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> 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."
>
> 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.

Petition for a Writ of Certiorari at Exhibit A, Avitzur v. Avitzur, 51 U.S.L.W. 3842 (U.S. May 24, 1983) (No. 82-1854).

23. Avitzur v. Avitzur, 86 A.D.2d 133, 134, 449 N.Y.S.2d 83, 84 (App. Div. 1982), *rev'd*, 58 N.Y.2d 108, 109, 446 N.E.2d 136, 137, 459 N.Y.S.2d 572, 573 (1983), *cert. denied*, 52 U.S.L.W. 3262 (U.S. Oct. 4, 1983) (No. 82-1854).

24. *Id.* The husband argued that enforcement of the Ketubah's provisions would require the court to unconstitutionally construe the meaning or significance of church doctrine.

25. *Avitzur*, 86 A.D.2d at 134, 449 N.Y.S.2d at 84 (distinguishing Waxstein v. Waxstein, 90 Misc. 2d 784, 395 N.Y.S.2d 877 (Sp. Term), *aff'd*, 57 A.D.2d 863, 394 N.Y.S.2d 253 (App. Div. 1977); Margulies v. Margulies, 42 A.D.2d at 517, 344 N.Y.S.2d at 482; Rubin v. Rubin, 75 Misc. 2d at 776, 348 N.Y.S.2d at 61; Koeppel v. Koeppel, 138 N.Y.S.2d 366 (Sp. Term 1954), *aff'd*, 3 A.D.2d 853, 161 N.Y.S.2d 694 (App. Div. 1957)).

26. Justice Mahoney's reference to "liturgical" agreements distinguishes civil agreements, i.e., completely outside religious circumstances or ceremony, from agreements that

the parties a civil divorce, had no further interest in the matter.[27] Justice Levine, in his dissent, noted that the couple voluntarily signed the Ketubah triggering application of civil contract principles. He reasoned that enforcement of the promise to obtain a religious divorce did not entail participation in a religious ceremony, and that the husband's refusal to honor his promise prevented the wife from remarrying in accordance with her religious beliefs.[28]

The New York Court of Appeals reversed and ordered the husband to specifically perform his promise to obtain a Get.[29] Judge Wachtler, writing for the court, conceded that provisions of the document referring to religious laws were not enforceable. He maintained, however, that the provision requiring the parties to appear before the religious tribunal in matters concerning their marriage was analogous to an arbitration clause in an antenuptial agreement.[30] The court applied principles of contract law to the provision of the Ketubah. Judge Wachtler noted that the Supreme Court had resolved intrachurch property disputes by using principles of property law that did not necessitate inquiry into church doctrine.[31] He reasoned, therefore, that *Avitzur* could be decided without litigating doctrinal issues by similarly using secular principles of law.[32]

In a lengthy dissent, Judge Jones agreed with the majority that in specific instances religious disputes could be resolved without interpretation of religious doctrine, thereby complying with first amendment limitations.[33] Judge Jones disagreed, however, that secular law could be applied to provisions extracted from a religious document.[34] According to the dissent, determination of the husband's obligations under the Ketubah could not be accomplished without inquiry into Jewish law and tradition, which

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are entered into as part of a religious ceremony, professing to be "executed and witnessed . . . in accordance with Jewish law and tradition." *Avitzur*, 86 A.D.2d at 135, 449 N.Y.S.2d at 84.

27. *Id.*

28. *Id.* at 135-36, 449 N.Y.S.2d at 85.

29. *Avitzur*, 58 N.Y.2d at 115-16, 446 N.E.2d at 139, 459 N.Y.S.2d at 575.

30. *Id.* at 113-14, 446 N.E.2d at 138, 459 N.Y.S.2d at 574 (citing Bowmer v. Bowmer, 50 N.Y.2d 288, 406 N.E.2d 760, 428 N.Y.S.2d 902 (1980) (judicial recognition of arbitration clauses incorporated into separation agreements)). *Bowmer* noted that an arbitration clause gave the parties the opportunity to choose someone they both felt was well qualified to resolve disputes. The court also observed that arbitration was informal, expedient, and less costly than litigation. *Id.* at 293, 406 N.E.2d at 761-62, 428 N.Y.S.2d at 904-05.

31. *Avitzur*, 58 N.Y.2d at 114-15, 446 N.E.2d at 138, 459 N.Y.S.2d at 574 (citing Jones v. Wolf, 443 U.S. 595 (1979)).

32. *Avitzur*, 58 N.Y.2d at 115-16, 446 N.E.2d at 138-39, 459 N.Y.S.2d at 575.

33. *Id.*, 446 N.E.2d at 139, 459 N.Y.S.2d at 576 (Jones, J., dissenting).

34. *Id.*

is prohibited by the religion clause.[35]

This Note will analyze the principles applied by the *Avitzur* court to compel specific performance of a promise contained in a Jewish marriage document. Particular emphasis will be given to the Supreme Court's interpretation and application of the first amendment's religion clause. The Note will also review how state courts have resolved first amendment issues in contract disputes that primarily involve judicial enforcement of the Ketubah or civil agreements to obtain a Get. An evaluation of the *Avitzur* decision will indicate that the courts are in need of Supreme Court direction to resolve religious disputes arising between individuals. Finally, the Note will conclude with an analysis of *Avitzur*'s impact on future litigation concerning religious practice and doctrine.

I. Judicial Interpretation of the Religion Clause

A. *Supreme Court—Parameters of the First Amendment Defined*

The rules defining the meaning and scope of the first amendment's religion clause evolved from the decision by the United States Supreme Court in *Watson v. Jones*.[36] The *Watson* Court addressed the role of the civil courts in resolving an intrachurch property dispute that arose between two factions of a local congregation.[37] The Court denied civil court intervention, emphasizing that the first amendment had secured religious liberty from interference by the government.[38] According to the Court, when members of the church body united, they implicitly consented to be bound by its government. The Court reasoned that this consent and the ability of the church to structure its own government would be meaningless if decisions made by church governing bodies could be appealed to the secular courts.[39] It therefore concluded that deference must be given to the decisionmakers within the church.[40]

35. *Id.* at 119-21, 446 N.E.2d at 141-42, 459 N.Y.S.2d at 577-78.

36. 80 U.S. (13 Wall) 679 (1872). *Watson* was a diversity case, decided prior to judicial recognition that the first amendment was applicable to the states by the fourteenth amendment. *See* Presbyterian Church v. Hull Church, 393 U.S. 440, 445 n.4 (1969).

37. *Watson*, 80 U.S. (13 Wall) at 726-30.

38. *Id.*

39. *Id.* at 728-29.

40. *Id.* The *Watson* Court stated:

> [T]he rule of action which should govern the civil courts . . . is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.

Id. at 727.

First amendment principles were again applied to an intrachurch property dispute in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church (Hull Church)*.[41] The Supreme Court addressed whether a state court could determine if one faction of a church had departed from the tenets of faith, thereby justifying the possession of church property by the other faction.[42] The Court held that the state court could not base a decision on its own interpretation of church doctrine and the significance the court assigned to that doctrine.[43] It recognized the state's interest in resolving property disputes but reaffirmed the principles stated in *Watson v. Jones* that the secular courts must defer to church polity.[44] Writing for the Court, Justice Brennan maintained that *Watson* left the courts no role in determining the ecclesiastical questions presented in *Hull Church*.[45] He did assert, however, that there are circumstances when limited review of ecclesiastical determinations would be appropriate.[46] He maintained that not all intrachurch disputes over property jeopardize first amendment values and introduced the use of "neutral principles of law" to resolve intrachurch property disputes.[47] This approach, which uses state property laws to resolve the controversy,[48] was carefully distinguished

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41. 393 U.S. 440 (1969).

42. *Id.* at 441

43. *Id.* at 451-52. In its conclusion that the first amendment required nonintervention by the courts in intrachurch property disputes, the *Hull Church* Court stated: "In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all." *Id.* at 446 (quoting Watson v. Jones, 80 U.S. (13 Wall) 728-29 (1872)).

44. *Hull Church*, 393 U.S. at 445.

45. *Id.* at 447. In *Serbian Eastern Orthodox Diocese v. Milivojevich*, decided after *Hull Church*, the Court noted that the *Watson* rule requiring deference to religious tribunals was mandated by the first amendment. *Serbian*, 426 U.S. 696, 712 (1976) (citing Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, 396 U.S. 367, 369 n.3 (1970); Presbyterian Church v. Hull Church, 393 U.S. 440, 447 (1969); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 115-16 (1952)).

46. *Hull Church*, 393 U.S. at 447. Justice Brennan was referring to Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929). The Supreme Court in *Gonzalez* refused to order the appointment to a chaplaincy that was claimed under a will providing for the placement. *Id.* at 16. In dictum, the Court stated that "[i]n the absence of fraud, collusion or arbitrariness" decisions by religious tribunals regarding ecclesiastical matters must be accepted by the courts. *Id.* Although the Court in *Gonzalez* introduced an exception to the rule that required deference to ecclesiastical authority, the exception was not applicable to the facts presented in *Gonzalez*. As noted by the Court in *Serbian*, the Supreme Court has never applied the exception. 426 U.S. at 712.

47. *Hull Church*, 393 U.S. at 449.

48. Later in the same year, the Supreme Court denied appeal of a state court's resolution of an intrachurch property dispute for lack of a federal question. The Court reasoned that the controversy involved no inquiry into religious doctrine and that state law could be applied to the dispute. Maryland & Va. Eldership of the Churches of God at Sharpsburg,

from litigation that requires courts to resolve controversy over religious doctrine and practice and is prohibited by the first amendment.[49]

In 1979, the Supreme Court officially approved the use of the "neutral principles of law" approach in intrachurch property disputes.[50] In *Jones v. Wolf*,[51] a controversy over the ownership of church property arose following a schism in a local church. The Georgia Supreme Court, presented with the issue of which faction of the formerly united congregation was entitled to the church property,[52] adopted the "neutral principles" approach and evaluated state property statutes.[53] The Supreme Court, with four justices dissenting, affirmed the state court's resolution of the dis-

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396 U.S. 367, 367-68 (1970). Justice Brennan, in a concurring opinion, expanded on the "neutral principles of law" approach he had introduced in *Hull Church*, and explained the parameters of its use. In applying this approach, Justice Brennan asserted that the courts could study statutes, deeds and other related documents in order to resolve intrachurch property disputes. If the application of secular law, however, required resolution of doctrinal issues, Justice Brennan emphasized that deference must be given to the religious tribunals. *Id.* He further emphasized that when a secular court inquires into religious doctrine, it risks inhibiting the free development of the doctrine. *Id.*

49. *Hull Church*, 393 U.S. at 449. The Supreme Court was again called upon to resolve an intrachurch property dispute in Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976). The Court held that a state court's adjudication of a dispute over the control of a diocese's property, which involved detailed review of conflicting testimony regarding internal church procedures and doctrine, unconstitutionally interfered with ecclesiastical decisions. *Id.* at 718. Justice Brennan, relying upon *Watson*, *Gonzalez*, and *Hull Church*, stated that the "neutral principles" approach was not applicable in a decision that depended on the resolution of internal church matters and ambiguous church law. *Id.* at 721. He reasoned that inquiries into church polity necessitated interpretation of religious law and might result in a court substituting its own interpretation of the religious doctrine for the interpretation adopted by the church. *Id.* In a dissenting opinion, Justice Rehnquist noted that factual inquiry was required in the resolution of any conflicting claims. According to the dissent, the court's inquiry into intrachurch disputes did not necessarily mean that the court was expressing doctrinal preference. *Id.* at 726 (Rehnquist, J., dissenting); *see infra* note 91. Justice Rehnquist expressed concern that the majority in *Serbian* was divesting the courts of any authority to resolve intrachurch disputes and that the immunity granted to the churches could foster lawlessness within their organizations. *Serbian*, 426 U.S. at 734 (Rehnquist J., dissenting).

50. The "neutral principles" approach initially evolved from a state adjudication of an intrachurch property dispute in Georgia that was discussed by the Court in *Hull Church* as a potentially workable approach to these disputes. 393 U.S. at 440. The concept was refined by the Georgia Supreme Court in Carnes v. Smith, 236 Ga. 30, 222 S.E.2d 322, *cert. denied*, 429 U.S. 868 (1976); *see* Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, 396 U.S. 367, 367-68 (1970) (Brennan, J., concurring); *see also supra* note 48 and accompanying text.

51. 443 U.S. 595 (1979).

52. *Id.* at 597-602. The property in question was in the name of a local church that was a member of a larger hierarchical body. A majority of the local church's members voted to split with the general church and retained possession of the church property. The minority members brought this action to state court to regain title of the property. *Id.* at 597-600.

53. *Id.* at 599-604. The court awarded legal title to the majority faction after examining

pute.[54] Justice Blackmun, writing for the majority, expanded upon the approach discussed in *Hull Church* and stated that a state court was free to resolve church property disputes as long as the court's review does not involve consideration of doctrinal matter, rituals, or tenets of faith.[55] The Court carefully noted that deference to ecclesiastical tribunals is constitutionally mandated when disputes revolve around the questions of religious doctrine and practice.[56] Justice Blackmun reasoned that the "neutrality principle" is completely secular in operation because it relies on objective concepts of property law.[57] He proceeded to list the advantages of this approach, stating that the "neutral principles" approach is flexible enough to accommodate all forms of religious organization and, that by ordering private rights and obligations, the court's decisions would reflect the parties' intentions.[58] The Court cautioned that any evaluation of religious documents must be done solely on secular terms. If a document incorporated religious concepts requiring interpretation, a court must defer resolution of the issue to the authoritative ecclesiastical body.[59]

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the property deeds. It determined that the local church, which the court reasoned was represented by the majority, held valid title to the property. *Id.*

54. *Id.* at 602-04.

55. *Id.* at 602. *See* Reardon v. Lemoyne, 122 N.H. 1042, 454 A.2d 428 (1982). Three teachers and the principal of a parochial school challenged the refusal by the bishop and school board to grant them a termination hearing as provided for in their employment contract. *Id.* at 1044-47, 454 A.2d at 430-31. The New Hampshire Supreme Court discussed whether the court had jurisdiction over the parochial school and church officials. In granting jurisdiction, the court noted that the constitution prohibited the court's intervention in religious disputes involving doctrinal issues. The court asserted, however, that the first amendment had not granted religious entities total immunity. *Id.* at 1047, 454 A.2d at 431. According to the court, jurisdiction could be granted over religious controversies involving property or contractual rights that are not influenced by doctrinal issues. *Id.* Justice Bois, writing for the court, reasoned that it was unfair to deny access to the courts to parties who had voluntarily entered into civil contracts. *Id.*, 454 A.2d at 432. Using the "neutral principles of law" approach derived from *Jones v. Wolf*, the court explained that provisions of a contract could be evaluated without interfering with religious doctrine. *Id.* at 1047-48, 454 A.2d at 432 (citing Jones v. Wolf, 443 U.S. 595, 602-04 (1979)).

56. *Jones*, 443 U.S. at 602; *see supra* note 45 and accompanying text.

57. *Jones*, 443 U.S. at 603. Justice Blackmun asserted that the "neutral principles" approach did not inhibit free exercise of religion. According to the majority, this approach could be used for resolution of intrachurch disputes in the same manner that provisions of state law could be applied to govern how churches owned property or hired employees. *Id.* at 606.

58. *Id.* at 603.

59. *Id.* at 604; *see generally* Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CALIF. L. REV. 1378 (1981). Ellman has cautioned that the contractual interests and religious freedoms of the church's members might be sacrified when courts refuse to adjudicate religious disputes. *Id.* at 1383. Ellman discussed four reasons why internal church agreements should be enforced. First, enforcement is consistent with an individual's expectations and sense of justice. Second, as stated above, the religious

Justice Powell, writing for the dissent, expressed concern that the "neutral principles" approach would produce increased involvement by the courts in church controversies.[60] He reasoned that deference to church polity was required to ensure that courts do not entangle themselves in religious doctrine. Without such restraint, the dissent concluded that courts would become unconstitutionally involved in supporting or overturning the resolution of disputes by church governing bodies.[61]

The Court's attention in *Cantwell v. Connecticut*,[62] moved from "neutral principles" and deference to church polity to the constitutionality of government regulations when reviewing state statutes that allegedly affect individuals' first amendment rights. The Court declared unconstitutional an ordinance that gave public officials discretion to deny licenses for the solicitation of funds if the officials determined that the solicitation was not for a "religious cause."[63] The Court agreed, however, that an individual's conduct related to religious matters could be regulated in some instances.[64] It distinguished between the freedom to believe, which is absolute, and the freedom to act, which is presumed, but more dependent on the surrounding circumstances.[65] Justice Roberts, writing for the Court, explained that the freedom to act is subject to regulation for the protection of society as long as the regulation does not unduly infringe upon this freedom.[66]

In *Wisconsin v. Yoder*,[67] the Supreme Court introduced a balancing test to determine which claims against state statutes invoked protection of the

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freedoms of church members are protected. Third, the recognition of enforceable contracts facilitates the operation of complex organizations. Finally, the enforcement of agreements implements the parties' intention. *Id.* at 1402-04. If the contract is vague and requires interpretation by religious authorities who are divided on the issue, it may not be possible to construe the terms of the agreement with enough certainty to permit resolution of the dispute. *Id.* at 1417.

60. *Jones*, 443 U.S. at 611 (Powell, J., dissenting).

61. *Id.* at 614-17. *Contra* Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 726-28 (1976) (Rehnquist, J., dissenting). *See supra* note 49 and accompanying text.

62. 310 U.S. 296 (1940).

63. *Id.* at 303.

64. *Id.* at 303-04.

65. *Id.*

66. *Id.* at 304; *see* Sherbert v. Verner, 374 U.S. 398 (1963); *see generally* McDaniel v. Paty, 435 U.S. 618 (1978). The Supreme Court stated that a statute disqualifying ministers from serving as delegates to a state constitutional convention was directed at conduct, not religious belief, and therefore did not interfere with the freedom of belief. *Id.* at 626-27 (citing Torcaso v. Watkins, 367 U.S. 488 (1961)) (distinguishing between conduct and belief). The Court concluded, however, that the statutory disqualification did violate the right to free exercise of religion because it conditioned the right on the surrender of the right to seek office. *McDaniel*, 435 U.S. at 627-29. The Court reasoned that the freedom of belief was predicated on the freedom to practice that belief. *Id.*

67. 406 U.S. 205 (1972).

free exercise clause. Amish parents challenged a state ordinance requiring school attendance until age sixteen as an interference with the exercise of their religion.[68] The Court held that the state could not compel the parents to send children to school who had completed the eighth grade.[69] In reaching this conclusion, the Court balanced the state's interest in maintaining an educational system against the fundamental right to free exercise of religious beliefs.[70] Writing for the Court, Chief Justice Burger explained that the religion clause does not, however, permit individuals to fashion standards of conduct based on personal preference and to undermine compelling governmental interests.[71]

In *Everson v. Board of Education*,[72] the Supreme Court shifted its attention to the establishment clause of the first amendment. The Court held[73] that a state statute authorizing reimbursement of bus fares paid by children attending parochial schools did not violate the first amendment clause that prohibits any "law respecting an establishment of religion."[74] In its discussion of activity that violates the clause, the *Everson* Court noted that the government could not force a person to profess a belief or disbelief in any religion or compel or prohibit church attendance.[75] According to the Court, both federal and state governments are foreclosed from establishing a church or passing laws that give preference to one reli-

68. *Id.* at 213.

69. *Id.* at 215-16.

70. *Id.* The same year that *Wisconsin v. Yoder* was decided, the United States Court of Appeals for the Ninth Circuit balanced government and religious interests in EEOC v. Pacific Publishing Ass'n, 676 F.2d 1272 (9th Cir. 1982). The employee in *Pacific Press* filed an employment discrimination suit against a religious affiliated publishing house. The publisher responded by terminating the individual, claiming that church doctrine prohibited suits against the church by its members. *Id.* at 1280. The publisher, relying on *Serbian*, claimed that the EEOC could not maintain a cause of action against the religious organization because the court could not review ecclesiastical decisions. *Id.* at 1281. The court held that in this instance application of the employment discrimination laws did not violate the first amendment. *Id.* The court reasoned that although the action imposed liability on the religious organization for disciplinary actions based in religious doctrine, the compelling government interests overrode the religious concerns. *Id.*

71. *Yoder*, 406 U.S. at 215-16. Chief Justice Burger noted that claims resting on religious beliefs must be rooted in deep religious convictions. The Court has, however, recognized compelling government interests over legitimate claims based on the free exercise clause. *See* United States v. Lee, 455 U.S. 252 (1982) (government interest in maintenance of the social security system required contributions by members of Amish religion although doing so interfered with free exercise of belief).

72. 330 U.S. 1 (1947); *see* Walz v. Tax Comm'n, 397 U.S. 664 (1970) (property tax exemptions to religious organizations do not favor or sponsor religion in violation of the first amendment).

73. The Court in *Everson* was split in a 5-4 decision.

74. *Everson*, 330 U.S. at 17; *see supra* note 72.

75. *Everson*, 330 U.S. at 15-16.

gion over another.[76]

The current approach for evaluating state regulations, which focuses on the first amendment's establishment clause, was discussed in *Committee for Public Education and Religious Liberty v. Nyquist*.[77] The Court upheld a challenge to state financial aid to parochial schools.[78] It articulated a three prong test to determine the limits imposed by the religion clause on government action.[79] First, to be constitutionally valid, the law must reflect a secular, or nonsectarian, legislative purpose.[80] Second, the law's primary effect must neither advance nor inhibit religion.[81] Third, the statute must avoid excessive government entanglement with religion.[82] Writing for the Court, Chief Justice Burger concluded that the statute fostered excessive entanglement between church and state.[83] He explained that although the legislative purpose in preserving a healthy and safe educational environment was fully secular, the primary effect of the statute advanced religion by directly subsidizing the religious activities of parochial schools.[84]

In addition to first amendment limitations on government regulations, the Court has also discussed the effect of the religion clause on the contractual obligations of religious organizations. In *United Methodist Church v.*

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76. *Id.* at 15. The interrelations of the establishment clause and the free exercise clause were discussed in Engel v. Vitale, 370 U.S. 421 (1962). The Court noted the dual nature of the first amendment in its rejection of a state law requiring the recitation of an official state prayer in public schools. *Id.* at 430. Justice Black, writing for the majority, compared the free exercise and establishment clauses, and noted that although they overlapped they were in fact different. Justice Black asserted that the free exercise clause, which protects against the regulation of an individual's religious beliefs, differs from the establishment clause, which does not depend upon a showing of direct government compulsion. *Id.* at 430. He emphasized that the establishment clause could be violated by the enactment of laws that tend to establish an official religion. *Id.* at 431; *see supra* note 2 and accompanying text.

For a description of the dual nature of the first amendment, see *In re* Marriage of Hadeen, 27 Wash. App. 566, 619 P.2d 374, 379 (1980) (establishment clause guarantees government neutrality in religious matters while the free exercise clause recognizes an individual's liberty in religion).

77. 413 U.S. 756 (1973).

78. *Id.* at 772 (statute granted financial aid to parochial schools in the form of maintenance and repair grants, tuition reimbursement grants, and income tax benefits). *But cf.* Mueller v. Allen, 51 U.S.L.W. 5050 (U.S. June 28, 1983) (state statute allowing taxpayers to deduct expenses incurred for tuition payments to parochial schools does not violate the first amendment's religion clause).

79. The Supreme Court had introduced the three prong test two years earlier in Lemon v. Kurtzman, 403 U.S. 602 (1971).

80. *Nyquist*, 413 U.S. at 773 (citing Epperson v. Arkansas, 393 U.S. 97 (1968)).

81. *Nyquist*, 413 U.S. at 773 (citing School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963)).

82. *Nyquist*, 413 U.S. at 773 (citing Walz v. Tax Comm'n, 397 U.S. 664 (1970)).

83. *Nyquist*, 413 U.S. at 773-74.

84. *Id.*

Superior Court of California,[85] the Court declined to expand the scope of first amendment protections to a suit against a religious organization for breach of contract[86] in its management of retirement homes.[87] The religious organization claimed that the first amendment prevents the courts from inquiring into the operation of a hierarchical church.[88] In discussing the constitutional issues raised by United Methodist, Justice Rehnquist referred to the limits imposed by the Constitution in intrachurch disputes. He noted, however, that the Court had never suggested that these limits be applied outside the context of intrachurch disputes.[89] The Court refused to recognize the danger of judicial support of a particular belief[90] where fraud or breach of contract is alleged.[91]

B. State Courts' Applications

An early case that recognized the Ketubah as a civilly enforceable contract was *Hurwitz v. Hurwitz*.[92] A widow, defending an action to eject her from the family residence, based her right of possession on provisions con-

85. 439 U.S. 1369 (1978). The Court's opinion primarily dealt with procedural issues raised by United Methodist's application for a stay of state court proceedings pending Supreme Court determination of its petition for writ of certiorari. The Court denied the application for stay, stating that it was unlikely certiorari would be granted. *Id.* at 1374.

86. Fraud and statutory violations were also alleged against United Methodist. *Id.* at 1373.

87. *Id.* at 1369.

88. *Id.* at 1372.

89. *Id.* at 1372-73. In *Walz v. Tax Comm'n*, Chief Justice Burger discussed the Court's attempts to define the scope of first amendment prohibitions. He cautioned that a decision from any one case that prohibits interference with first amendment guarantees may sweep too broadly outside its own facts. 397 U.S. 664, 668 (1970). The Chief Justice emphasized that the amendment was not a statutory prohibition against all church and state relationships but instead ensured neutrality by the government. *Id.* at 669; *see* McDaniel v. Paty, 435 U.S. 618, 618 n.7 (1978).

90. *See supra* note 2 and accompanying text.

91. *United Methodist*, 439 U.S. at 1373. Any disputes involving religious matters arguably entail some degree of the court's entanglement in religion. In intrachurch disputes, where one faction of the church is requesting adjudication, the court's involvement may violate the establishment clause. When secular issues are presented, however, the courts are able to refer to contract laws and principles. Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CALIF. L. REV. 1378, 1382 (1981).

See Lexington Theological Seminary, Inc. v. Vance, 596 S.W.2d 11 (Ky. Ct. App. 1979). In *Lexington*, the seminary denied a degree to Vance after he voluntarily admitted that he was a homosexual. *Id.* at 12. The Kentucky Court of Appeals judicially recognized the seminary's admission catalog as a contract and addressed the issue of whether the contract had been breached. *Id.* at 11-14. The seminary's denial of Vance's degree was upheld. Because the case could be decided on a contractual basis, the court noted that it was unnecessary to inquire into whether an order compelling the seminary to issue a degree would have violated the religion clause of the first amendment. *Id.*

92. 216 A.D. 362, 215 N.Y.S. 184 (App. Div. 1926).

tained within the Ketubah.[93] Denying plaintiff's motion for judgment on the pleadings,[94] the Appellate Division for the New York Supreme Court distinguished those provisions in the Ketubah that referred to the laws of Moses and Israel from the section of the document that entitled the widow to possession of the family home.[95] The court instructed the special term to test the provisions of the Ketubah relating to the widow's property rights under state law. If the provisions were not found contrary to law, the court asserted that the intention of the parties should be enforced.[96]

Enforcement of an individual's breach of promise to obtain a religious divorce was discussed by the Appellate Division of the New York Supreme Court in *Margulies v. Margulies*.[97] The husband in *Margulies* failed to comply with a stipulation during civil divorce proceedings to obtain a Get, and was incarcerated for contempt of court.[98] The court held that the husband could not be imprisoned for future refusals to obtain the Get.[99] It did, however, approve the imposition of fines for continued refusal to honor the stipulation, noting that the husband had voluntarily agreed to the Get and, in doing so, knew the consequences of his act.[100]

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93. *Id.* at 363, 215 N.Y.S. at 185.

94. The plaintiff's motion for judgment on the pleadings was based on the contention that the Ketubah was not recognized in law and therefore did not constitute a sufficient defense to plaintiff's complaint. *Id.* at 364, 215 N.Y.S. at 186. The Appellate Division for the New York Supreme Court denied the motion, stating that the case should be tried on its merits to determine whether or not the relevant provisions of the Ketubah were in accord with the state laws. *Id.* at 366, 215 N.Y.S. at 188.

95. *Id.* at 365, 215 N.Y.S. at 187. The court failed to explain how the provision of the Ketubah relating to property rights could be extracted from a document that as a whole made reference to religious laws. *See supra* notes 55-59 and accompanying text.

96. *Id.* at 367, 215 N.Y.S. at 188; *see* Prebble, *Choice of Law to Determine the Validity and Effect of Contracts: A Comparison of English and American Approaches to the Conflict of Laws*, 58 CORNELL L. REV. 433 (1973).

97. 42 A.D.2d 517, 344 N.Y.S.2d 482 (App. Div. 1973).

98. *Id.* at 517, 344 N.Y.S.2d at 483.

99. *Id.* Both the majority and dissent noted that a Jewish divorce could only be granted if sought willingly. Therefore, a divorce obtained by compulsion of the court would not be valid. *Id.* at 517, 518, 344 N.Y.S.2d at 484-85 (Nunez, J., dissenting) (citing 6 ENCYCLOPEDIA JUDAICA 130 (1975).

100. *Margulies*, 42 A.D.2d at 517, 344 N.Y.S.2d at 484-85. In a subsequent decision by the same court, it was noted that *Margulies* raised, but failed to settle, the issue of whether a civil court could compel a party to get a religious divorce. Waxstein v. Waxstein, 57 A.D.2d 863, 394 N.Y.S.2d 253 (App. Div. 1977) (construing Margulies v. Margulies, 42 A.D.2d 517, 344 N.Y.S.2d 482 (App. Div. 1973)). The court in *Waxstein* suggested that *Margulies* inferentially compelled specific performance by giving the husband the option to pay a fine or to comply with the stipulation to obtain a Get. *Waxstein*, 57 A.D.2d at 863, 394 N.Y.S.2d at 253.

Questions regarding the court's authority to compel a person to obtain a Get were also raised in *Koeppel v. Koeppel*, 3 A.D.2d 853, 161 N.Y.S.2d 694 (App. Div. 1957). During an action for annulment, a couple signed an agreement whereby the husband agreed to obtain a

Judge Nunez, in a dissenting opinion, disagreed with the imposition of the fine. He contended that fulfilling the promise involved participation in religious ceremonies and procedures that were matters of personal conviction and could not be compelled by specific performance.[101]

The New York Family Court in *Rubin v. Rubin*[102] decided the enforceability of a promise to obtain a Get contained in a separation agreement. The separation agreement conditioned payments of support and alimony to the wife upon her consent to obtain a Get.[103] The court allowed the husband to withhold the support payments until he secured his former wife's consent.[104] In a decision that outlined the historical significance of the Ketubah and the Get,[105] the court distinguished *Rubin* from *Watson v. Jones*. The court recognized that *Watson* enjoined the courts from adjudicating disputes that interfered with decisions made by religious tribunals.[106] The court reasoned, however, that enforcement of the agreement in *Rubin* did not raise issues of separation of church and state. Instead, the court asserted that its holding was simply a recognition of the parties' expectations under the separation agreement.[107]

A New York court was again asked to recognize the Ketubah as a valid contract in *In re Estate of White*.[108] This time, unlike the court in *Hur-*

Jewish divorce "whenever it shall become necessary." *Id.* at 853, 161 N.Y.S.2d 695. The Special Term for the New York Supreme Court enforced the contract and noted that compliance with the agreement was not equivalent to a requirement that the husband participate in religious practice. Koeppel v. Koeppel, 138 N.Y.S.2d 366, 373 (Sp. Term 1954). The appellate division reversed, holding that the husband could not be forced to obtain the Get. *Koeppel*, 3 A.D.2d at 853, 161 N.Y.S.2d at 695. In a memorandum opinion, the court reasoned that the language of the contract was too indefinite to determine what circumstances would satisfy a finding that the divorce was "necessary." The court also indicated that the wife had already been remarried by a rabbi. *Id.* It can be inferred that had the provisions of the contract been clearer, and the need for the Get more apparent, the court would have compelled specific performance of the promise.

101. *Margulies*, 42 A.D.2d at 518, 344 N.Y.S.2d at 485 (Nunez, J., dissenting).

102. 75 Misc. 2d 776, 348 N.Y.S.2d 61 (Fam. Ct. 1973).

103. *Id.* at 778, 348 N.Y.S.2d at 63.

104. *Id.* at 783, 348 N.Y.S.2d at 68.

105. *See supra* notes 17 and 18.

106. *Rubin*, 75 Misc. 2d at 782, 348 N.Y.S.2d at 67.

107. *Id.*; *see* Waxstein v. Waxstein, 90 Misc. 2d 784, 395 N.Y.S.2d 877 (Sp. Term), *aff'd*, 57 A.D.2d 863, 394 N.Y.S.2d 253 (App. Div. 1977) and *supra* note 100. The Special Term for the New York Supreme Court compelled a husband to obtain a Get as promised in a separation agreement. The court reasoned that the agreement was a lawful contract and should be enforced to carry out the intention of the parties. *Id.* at 785-89, 395 N.Y.S.2d at 879-81. The court also explained that specific performance could be compelled if the remedy at law for breach of contract was inadequate. *Id.* at 879; *see also infra* note 116 and accompanying text.

108. 78 Misc. 2d 157, 356 N.Y.S.2d 208 (Sur. Ct. 1974).

witz,[109] the New York Surrogate Court declined to recognize the provisions in a Ketubah as conferring property rights on either party. Prior to their marriage, the couple in *White* had signed an agreement whereby the wife waived all rights of election against her husband's will. During their wedding ceremony, the husband and wife signed a Ketubah that the wife claimed cancelled the prior antenuptial agreement and gave her, as her husband's widow, the right of election.[110] The surrogate court recognized the Ketubah strictly as a ceremonial document. The court held that because the document was not a civil contract that granted rights to the parties, it did not have a binding effect on their property rights as governed by state law.[111]

The issues surrounding the enforcement of a Ketubah and the authority of the courts to compel specific performance of a promise to obtain a Get were harmonized in *Minkin v. Minkin*.[112] Following the couple's civil divorce, the New Jersey Superior Court compelled the husband to secure a Jewish divorce in accordance with the provisions of the couple's Ketubah.[113] Judge Minuskin, writing for the court, explained that the courts would enforce a contract between a husband and wife as long as the contract was not contrary to public policy.[114] The court described the Ketubah as a document outlining reciprocal obligations between a hus-

109. 216 A.D. at 362, 215 N.Y.S. at 184.

110. *White*, 78 Misc. 2d at 158-59, 356 N.Y.S.2d at 209-10. The provision in the Ketubah referred to by the claimant stated that "in view of thy widowhood" the wife shall receive "100 zuzim." *Id.* at 158, 356 N.Y.S.2d at 208.

111. *Id.* at 159, 356 N.Y.S.2d at 209. The court suggested that the use of the Ketubah as a binding document had vanished with state law recognition of married women's rights:

> In modern times, especially in the more civilized countries where the law of the land protects married women with respect to their property rights, the *ketubah* as a bond on indebtedness has become almost obsolete. . . . Moreover, practically nowhere does the law of the land accord to the Rabbinical *ketubah* the force of a lien on the husband's property, real or personal. Thus, even for the observant and the orthodox, the *ketubah* has become more a matter of form and a ceremonial document than a legal obligation.

Id. at 159, 356 N.Y.S.2d at 210 (quoting G. HOROWITZ, THE SPIRIT OF THE JEWISH LAW, § 176 (1973)).

112. 180 N.J. Super. 260, 434 A.2d 665 (Super. Ct. Ch. Div. 1981).

113. *Id.* at 266, 434 A.2d at 668.

114. *Minkin*, 180 N.J. Super. at 262-63, 434 A.2d at 666. The *Minkin* court cited instances when a contract between spouses would not be enforced. The court noted that contracts contrary to public policy included those that were injurious to public interests, violated state laws, were against good morals, or interfered with public welfare or safety. *Id.* (citing Garlinger v. Garlinger, 129 N.J. Super. 37, 322 A.2d 190 (Super. Ct. Ch. Div. 1974)); *see* Parniawski v. Parniawski, 33 Conn. Supp. 44, 359 A.2d 719 (1976). An antenuptial agreement in *Parniawski* precluded either spouse from seeking alimony or any part of the estate owned by the other partner prior to their marriage. The Superior Court in Connecticut held that the antenuptial agreement was against public policy and superseded the statu-

band and wife that promoted a successful marital relationship. Judge Minuskin emphasized that enforcement of the Ketubah simply required the husband to do what he had agreed to do.[115] The court expressed concern that if the husband were allowed to renounce his promise to obtain a Get, the wife would be prevented from remarrying in accordance with her religious beliefs.[116]

The court also considered whether the order compelling the husband to obtain a Get infringed upon his first amendment free exercise rights. It found that enforcement of the Ketubah's provisions complied with the three prong test presented by the Supreme Court in *Nyquist*.[117] To apply the test,[118] the court called upon four rabbis versed in Jewish law.[119] The rabbis described the Ketubah as a civil contract.[120] They agreed that obtaining a Get did not involve a religious ceremony and explained that the parties were not required to state any creeds or acknowledge any religion during the procedures.[121] The rabbis considered the Get to be a severance of a contractual relation between a married couple that was concerned solely with the wife's right to remarry.[122] The court, therefore, concluded that its ruling did not interfere with the husband's right of free exercise of belief or violate the first amendment's prohibition against excessive entanglement with religion.[123]

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tory power of the court. *Id.* at 720; *see generally* Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 373 (1921).

115. *Minkin*, 180 N.J. Super. at 262-63, 434 A.2d at 666.

116. *Id.; see generally* Linzer, *On the Amorality of Contract Remedies—Efficiency, Equity and the Second Restatement*, 81 COLUM. L. REV. 111 (1981) (specific performance should be granted because money damages cannot compensate a party seeking a religious divorce). RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981) (contract remedies protect parties' expectations, placing them where they would have been had the contract not been breached); RESTATEMENT (SECOND) OF CONTRACTS § 360 (1981) (specific performance is available when damages are unavailable).

117. *Minkin*, 180 N.J. Super. at 264, 434 A.2d at 667; *see supra* notes 80-82 and accompanying text.

118. The court did not, however, analyze or explain how it applied each prong of the *Nyquist* test to the facts of this case. Nor was it explained why the test, which was used by the Supreme Court to determine whether a statute violated the establishment clause, was applicable to *Minkin*.

119. The credentials of the rabbis were listed by the court. *Minkin*, 180 N.J. Super. at 264 n.4, 434 A.2d at 667 n.4.

120. *Id.* at 265-66, 434 A.2d at 663; *see supra* note 111 and accompanying text for a description of the Ketubah as a ceremonial document.

121. *Minkin*, 180 N.J. Super. at 265-66, 434 A.2d at 667. A fifth rabbi, called upon by the husband, concluded that the procedures to obtain a Get constituted a religious act. The court appeared to reject the rabbi's testimony when he admitted he was not as knowledgeable about Jewish law as the other rabbis present. *Id.* at 266, 434 A.2d at 668.

122. *Id.* at 265-66, 434 A.2d at 667.

123. *Id.*

II. *AVITZUR V. AVITZUR*

A. Civil Enforcement of a Religious Agreement

Two years after *Minkin v. Minkin*, the New York Court of Appeals in *Avitzur v. Avitzur*[124] was asked to enforce a provision in a Ketubah that required a husband to appear before the rabbinical tribunal to obtain a religious divorce.[125] The court considered the role of the civil courts in the adjudication of matters that involve religious concerns,[126] and specifically enforced the provisions of the Ketubah.[127] The court did so, however, without thoroughly analyzing the various approaches used by other courts to address the first amendment issues.[128]

The court of appeals' decision in *Avitzur* reversed the appellate division's determination that the courts did not have jurisdiction to enforce the provisions of the marriage document.[129] The appellate division focused on the religion clause issues raised by the enforcement of the Ketubah rather than those issues related to the specific performance of a Get.[130] Justice Mahoney, writing for the appellate division, reasoned that the Ketubah was a liturgical agreement because it had been signed during a religious ceremony, and by its own terms stated it was executed in accordance with Jewish law.[131] Justice Mahoney warned against the precedent of allowing civil enforcement of religious covenants but did not explain what the implications might be.[132]

Justice Levine, dissenting in the appellate division, maintained that there had been a meeting of the minds between the parties to the Ketubah and viewed the document as a valid antenuptial agreement.[133] He referred to *Hurwitz v. Hurwitz*,[134] which upheld selected provisions of the Ketubah as contractual agreements, and stated that the provisions should be enforced to effectuate the intent of the parties.[135] Justice Levine reasoned

124. 58 N.Y.2d at 108, 446 N.E.2d at 136, 459 N.Y.S.2d at 572, *cert. denied*, 52 U.S.L.W. 3262 (U.S. Oct. 4, 1983) (No. 82-1854).

125. *Id.* at 111-12, 446 N.E.2d at 137, 459 N.Y.S.2d at 573.

126. *Id.* at 111, 446 N.E.2d at 136, 459 N.Y.S.2d at 572.

127. *Id.* at 116, 446 N.E.2d at 139, 459 N.Y.S.2d at 575.

128. *Id.* at 114-15, 446 N.E.2d at 138, 459 N.Y.S.2d at 574.

129. 86 A.D.2d at 134-35, 449 N.Y.S.2d at 84.

130. *Id.* The court distinguished *Avitzur* from those cases in which the promise to obtain a Get was found in civil agreements. *See supra* note 25 and accompanying text.

131. *Avitzur*, 86 A.D.2d at 134, 449 N.Y.S.2d at 84.

132. *Id.*

133. *Id.* at 136, 449 N.Y.S.2d at 85 (Levine, J., dissenting).

134. 216 A.D. 362, 215 N.Y.S. 184 (App. Div. 1926).

135. *Avitzur*, 86 A.D.2d at 136, 449 N.Y.S.2d at 85 (Levine, J., dissenting) (citing *Hurwitz*, 216 A.D. at 366, 215 N.Y.S. at 184).

that the husband merely had to appear before a rabbi and execute the Get document. He asserted that the husband's refusal to do so deprived the other party to the agreement of the free exercise of her beliefs.[136] Countering the majority's concern that dangerous precedent would be set by enforcing the agreement, the dissent suggested that granting civil court immunity to every agreement made during a religious ceremony would preclude enforcement of valid contractual promises.[137]

The court of appeals rejected the reasoning of the appellate division and held that the secular terms contained within the Ketubah were capable of judicial enforcement.[138] It addressed the husband's claim that the obligations imposed by the Ketubah arose from ecclesiastical law and could only be interpreted by an inquiry into religious doctrine and practice that was prohibited by the religion clause.[139] Judge Wachtler recognized that judicial consideration of religious doctrine was limited by the first amendment. Although the court referred to *Jones v. Wolf*,[140] *Serbian Orthodox Diocese v. Milivojevich*,[141] and *Presbyterian Church v. Hull Church*,[142] it did not discuss the Supreme Court's analysis of the first amendment issues raised in these cases.[143] Instead, the court focused attention on the Supreme Court's holding in *Jones v. Wolf*. Judge Wachtler interpreted the Court's approval of the "neutral principles of law" approach in intrachurch property disputes as authority to resolve religious disputes that could be decided solely on secular terms.[144]

Applying the "neutral principles" doctrine, the court concluded that although the Ketubah was entered into as part of a religious ceremony, the case could be decided without interpretation of ecclesiastical law.[145] Judge Wachtler likened the provision calling for a couple's appearance before the tribunal to a valid arbitration clause in an antenuptial agreement whereby the parties choose the forum in which to resolve their disputes.[146] Refer-

136. *Avitzur*, 86 A.D.2d at 136, 449 N.Y.S.2d at 85.

137. *Id.* at 137, 449 N.Y.S.2d at 86.

138. *Avitzur*, 58 N.Y.2d at 111, 446 N.E.2d at 136-37, 459 N.Y.S.2d at 572-73. The court of appeals did not discuss the cases distinguished by the lower court regarding promises contained in civil agreements to obtain a religious divorce. *See supra* note 25 and accompanying text.

139. *Id.* at 114, 446 N.E.2d at 138, 459 N.Y.S.2d at 574.

140. 443 U.S. 595 (1979).

141. 426 U.S. 696 (1976).

142. 393 U.S. 440 (1969).

143. *Avitzur*, 58 N.Y.2d at 114, 446 N.E.2d at 138, 459 N.Y.S.2d at 574.

144. *Id.* at 114-15, 446 N.E.2d at 138, 459 N.Y.S.2d at 574.

145. *Id.* at 115, 446 N.E.2d at 138-39, 459 N.Y.S.2d at 574-75.

146. *Id.* at 113-14, 446 N.E.2d at 138, 459 N.Y.S.2d at 574; *see supra* note 30 and accompanying text.

ring to principles of contract law, the court stated that those provisions of the Ketubah that were not contrary to the laws or public policy of the state should be enforced.[147]

In a dissenting opinion, Judge Jones contended that the majority's decision violated the first amendment's protection against excessive entanglement by the courts in religious matters.[148] A major portion of the dissent was spent reviewing the pleadings of the parties. Judge Jones concluded that the Ketubah could not be enforced without judicial inquiry into Jewish law and tradition. He vehemently disagreed with the majority that the "neutral principles" approach could be applied, reasoning that secular obligations cannot be effectively extracted from the religious document.[149] He noted that the wife had originally requested a declaration of all the rights contained in the Ketubah.[150] According to the dissent, the majority had conceded that this request was beyond the scope of the courts when it limited enforcement to the document's secular obligations.[151] He asserted that in order to determine which provisions were "secular," an examination of the laws and traditions of the Jewish faith would necessarily be required. In support of this assertion Judge Jones emphasized that the husband and wife had each provided a different construction of the Ketubah, and that the wife had specifically relied on expert testimony regarding Jewish law and custom in her affidavit.[152]

Judge Jones also noted that there was no evidence that the parties to the agreement had intended civil enforcement of its provisions.[153] He referred to the language of the Ketubah that authorized the Bet Din to impose its own terms of compensation if the parties failed to respond to a request to appear before the tribunal or failed to adhere to the tribunal's decision.[154] The dissent reasoned that the parties intended this provision as the exclu-

147. *Id.* at 115, 446 N.E.2d at 139, 459 N.Y.S.2d at 575. The court reasoned that selected provisions of the Ketubah could be enforced without judicial recognition of the entire document. *Id.* (citing Ferro v. Bologna, 31 N.Y.2d 30, 286 N.E.2d 244, 334 N.Y.S.2d 856 (1972)). The *Ferro* court had stated that although some provisions of a separation agreement were invalid, the entire contract was not rendered void. 31 N.Y.2d at 36, 286 N.E.2d at 246, 334 N.Y.S.2d at 859.

148. *Avitzur*, 58 N.Y.2d at 116, 446 N.E.2d at 139, 459 N.Y.S.2d at 575 (Jones, J., dissenting). Although the dissent raised many pertinent questions regarding the enforcement of the Ketubah, it failed to cite case authority in its conclusion that enforcement violated the first amendment.

149. *Id.* at 118, 446 N.E.2d at 141, 459 N.Y.S.2d at 577.

150. *Id.*.

151. *Id.*.

152. *Id.*.

153. *Id.* at 121, 446 N.E.2d at 140-41, 459 N.Y.S.2d at 576.

154. *Id.* at 120-21, 446 N.E.2d at 142, 459 N.Y.S.2d at 578.

sive remedy for a breach of their obligations under the Ketubah and did not contemplate judicial enforcement of the document.[155]

B. Misapplication of Supreme Court Direction

The practical common sense appeal of the *Avitzur* court's holding clouds its constitutional implications. Although compelling the husband to do only what he had agreed to do, the court disregarded the prohibitions of the first amendment. While the court of appeals admitted that the amendment prohibited consideration of religious doctrine, it failed to review the scope of the amendment's limitations. Since *Watson v. Jones*, the Supreme Court has repeatedly emphasized that the judiciary cannot interpret church doctrine.[156] Although the Court has offered different approaches for resolving first amendment cases,[157] it has never suggested that an inquiry that effectively requires an interpretation of ecclesiastical laws and practice would be permissible.

The Supreme Court in *Jones v. Wolf* approved the use of property and trust laws to resolve a dispute between factions of a church but did not indicate whether the approach was applicable to other religious disputes.[158] *Avitzur* reflects the difficulties of extending the "neutral principles" approach beyond intrachurch property disputes[159] without further direction by the Supreme Court.

Instead of approaching "neutral principles" as a means to resolve a dispute when controversy does not center around religious doctrine, *Avitzur* appears to interpret it as an approach that avoids doctrinal issues within the controversy. This interpretation fails to recognize the distinction made by the Supreme Court, in both *Hull Church* and *Jones*, between the resolu-

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155. *Id.*

156. Presbyterian Church v. Hull Church, 393 U.S. 440 (1969); *see supra* note 45 and accompanying text.

157. *See, e.g.*, Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (three prong test to evaluate the constitutionality of government regulations); Wisconsin v. Yoder, 406 U.S. 205 (1972) (balancing compelling state interests and first amendment claims); Everson v. Board of Educ., 330 U.S. 1 (1947) (distinguishing between conduct and belief); Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929) (fraud may permit court intervention in religious disputes).

158. *See* Jones v. Wolf, 443 U.S. 595 (1979); *see also supra* note 91 and accompanying text. The Supreme Court in *United Methodist*, decided before *Jones* but after the introduction of the "neutral principles of law" approach in *Hull*, appears to have adopted a similar approach in its decision involving a breach of contract by a religious organization. The Court, however, indicated that intrachurch dispute cases should be limited to their own facts. This raises the question whether the Court did in fact apply "neutral principles" in *United Methodist. See generally United Methodist*, 439 U.S. at 1372-73.

159. *See* Reardon v. Lemoyne, 122 N.H. 1042, 454 A.2d 428 (1982).

tion of a controversy over religious doctrine and the use of principles of civil law to resolve a property dispute.[160] The usefulness of the "neutral principles" approach, allowing the courts to effectuate the intention of parties to an agreement by recognizing their contractual rights and obligations,[161] was discussed by the Supreme Court in *Jones*. By failing to question whether the parties intended civil enforcement of the Ketubah,[162] the majority in *Avitzur* violated the Supreme Court caveat that cases that cannot be decided solely on secular terms are not proper for civil court adjudication.[163] A determination that certain provisions are "secular" and therefore enforceable is not permissible if it rests upon judicial evaluation of unresolved doctrinal issues. The majority failed to consider whether the document was a civil contract *before* applying contract principles to the provisions of the document. The different opinions expressed in *Minkin, White*, and *Hurwitz* regarding the validity of the Ketubah suggest that construction of the document is a matter of religious custom and interpretation of Jewish law.[164]

The dissent, however, specifically addressed this issue of the parties' intention in its reference to the terms of compensation contained in the Ketubah for breach of the agreement.[165] As the dissent also noted, the majority conceded that some of the provisions of the Ketubah were unenforceable. The logical inference made by Judge Jones was that the court's extraction of "secular" provisions from the document could only be made by impermissible inquiry into Jewish laws and customs.[166]

The majority and dissent in the appellate division questioned the possible precedential effect of either enforcing a religious document or denying the courts jurisdiction over any agreement entered into during religious ceremonies.[167] It failed, however, to address this issue and confined its

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160. *Jones*, 443 U.S. at 602-03; *Hull Church*, 393 U.S. at 445-47.

161. *See Jones*, 443 U.S. at 603.

162. *Id.* at 602.

163. *See supra* note 59 and accompanying text. The court did not specifically inquire into the legality of compelling an individual to obtain a Get. The husband never alleged his right to religious belief was being violated but had instead based his claim on the establishment clause. *Avitzur*, 58 N.Y.2d at 114, 446 N.E.2d at 138, 459 N.Y.S.2d at 574. Although the court did not review *Minkin* or *Rubin*, these decisions indicate that the acquisition of a Get does not require participation in religious practice. *See supra* note 100 and accompanying text.

164. Experts in *White* and *Minkin* provided conflicting interpretations of the legal significance of the Ketubah. Compare *supra* notes 111 and 120 and their accompanying texts.

165. *Avitzur*, 58 N.Y.2d at 121, 446 N.E.2d at 142, 459 N.Y.S.2d at 578 (Jones, J., dissenting).

166. *Avitzur*, *Id.* at 118-19, 446 N.E.2d at 141, 459 N.Y.S.2d at 577.

167. *Avitzur* 86 A.D.2d at 133, 449 N.Y.S.2d at 83.

discussion to principles of contract law. Recognition of the first amendment's protection against excessive entanglement by the court in *Avitzur* does not necessarily preclude judicial recognition of every agreement made with a religious organization or as part of a religious ceremony.[168] The religion clause requires, however, that judicial recognition must be denied if the intention of the parties or constructon of the agreement cannot be determined without inquiry into religious practice or law.

III. Conclusion

In *Avitzur v. Avitzur*, the New York Court of Appeals compelled specific performance of a provision in a Jewish marriage document. Applying the "neutral principles of law" approach, the court reasoned that parties to a valid agreement should be held to their promises. The court restricted its decision to principles of contract law. Therefore, it 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. This judicial recognition, or nonrecognition of select provisions of the Ketubah, encourages courts to interpret the significance of ceremonial documents and doctrine.

In its grant of specific performance, *Avitzur* also failed to address the problems presented by enforcement of this decree. The imposition of fines and incarceration to enforce the court's decision raises free exercise clause issues. A logical extension of *Avitzur* is the judicial enforcement of the findings by the religious tribunal, prohibited by the first amendment. Without such enforcement, however, adjudication of the case is meaningless. The serious constitutional problems posed by *Avitzur* could easily be avoided by placing promises that the parties intend to be legally enforceable in antenuptial agreements that have historically been recognized by the courts.

During the last century, the Supreme Court has attempted to define the scope of the first amendment's prohibitions. Workable solutions have been found to resolve intrachurch property disputes and to evaluate the legality of statutes affecting religious organizations or beliefs. The Court, however, has not specifically provided direction to the federal and state courts addressing the religion clause issues raised by individuals attempting to enforce a practice or agreement of religious consequence. Although the "neutral principles" approach recognizes legitimate governmental and

168. Property and contract agreements in *Jones, Vance*, and *Reardon* were adjudicated by the courts. The breach of wedding vows, often exchanged in a religious ceremony, are litigated daily in the divorce courts.

societal interests in certain contexts, Supreme Court guidance is needed in order to apply this approach outside the framework of intrachurch property disputes, and to assure government neutrality in religious matters.

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